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AGENCY.

I. *Appointment and Powers of Agent.*
II. *Responsibility of Agent to Principal.*
III. *Responsibility of Agent to Third Persons.*
IV. *Responsibility of Principal to Third Persons.*

I. *Appointment and Powers of Agent.*

1. Where a contract between a mortgagor and his mortgage creditors recites, that the former "shall be at liberty to sell any part of the mortgaged property, on paying to their agent a proportion of the purchase money equal to the proportion which the whole mortgaged security bears to the whole mortgage debt, and that thereupon their agent shall release the mortgage on the property so sold," the agent is authorized to release the mortgage only in the event of his having previously received the stipulated portion of the part so sold. *Sewell* v. *Hennen*, 216.
2. No particular form is required for a mandate. For certain purposes it must be express and special; (C. C. 2966;) for others, it may be verbal and general. *Ib.* 2961. It may vest an indefinite power, to do whatever may conduce to the interest of the principal. *Ib.* 2964. And when powers are granted to a person exercising a profession, or performing certain functions, the authority is to be inferred from the functions which the mandatary exercises. *Ib.* 2969. *Miller* v. *Canal and Banking Company*, 236.
3. The contract of mandate may be tacit as well as express; and the acts of the principal must be fairly and liberally construed towards those who contract with the agent, as well as towards the agent. *Ib.*

4. Where the law requires a contract to be in writing, the power to execute it must be in writing also; but where this is not required, the power may be in the simplest form, and the intention of the parties may be gathered, as much from their acts, as from their agreements. *Ib.*

5. A mandate given in writing, in express terms, cannot be enlarged by parol evidence; but, as a general rule, where authority is given by informal instruments and confers general powers, they should be construed with more liberality than more formal and deliberate instruments. The authority should also be construed, as to its nature and extent, according to the terms used and the objects to be accomplished. *Ib.*

6. An agent by whom a contract has been executed, and who has been released by the plaintiff from any liability to him, may be examined as a witness in an action on the contract, to prove the extent of his powers. *Ib.*

7. The second clerk of a steamer, may execute on behalf of the boat, a bill of lading in the ordinary way, and his receipt for merchandize delivered on board, will be binding; but to make a special contract—as to bind the boat for articles not delivered on board, his authority must be shown.

Kirkman v. *Bowman*, 246.

II. *Responsibility of Agent to Principal.*

8. An agent is responsible for interest on any sum of money employed for his own use, from the time of so employing it. C. C. 2984. *Marr* v. *Hyde*, 13.

9. A judgment rendered against the master and other owners of a steamer for damages, for injury sustained in consequence of the fault of the master, having been paid by the latter and one of the owners, they sued the other owner to recover his proportion of the damages. Defendant denied his liability to pay any thing to the master, who had the exclusive control of the boat at the time of the injury; and prayed that, for any amount which he might be condemned to pay to the other plaintiff, he might have judgment in warranty against the master: *Held*, that defendant is not bound to reimburse to the master any portion of the damages occasioned by his own fault (C. C. 2972); and that, though defendant, if he pay any portion of the loss, may have recourse against the master, the latter cannot be cited in warranty, his liability not being a case of personal warranty within the meaning of art. 379 of the Code of Practice. *Per Curiam:* Until defendant pays a portion of the loss he has nothing to claim of his agent, and can have no judgment against him. *Howrin* v. *Clark*, 27.

III. *Responsibility of Agent to Third Persons.*

10. A marshal is responsible to the party injured, for any damage sustained by the latter in consequence of an illegal sequestration of his property. The marshal must look for indemnity to the party under whose directions he acted. *Lartigue* v. *Claiborne*, 115.

11. Where a draft, drawn by one as agent for a succession, was accepted, on the faith of the succession and not of the agent personally, for the purpose of raising funds for the purchase of supplies for a plantation belonging

to the succession, for the use of which the proceeds were applied, and the authority of the agent to contract for the succession is not denied, the agent cannot be made personally liable for the draft. The acceptance of the draft is an admission of the agent's right to draw in that capacity, and throws on the acceptors the burden of proving the want of authority.

Duncan v. *Barnard*, 138.

IV. *Responsibility of Principal to Third Persons.*

12. The owners of a steamer are liable for any injury to others, resulting from the fault of those charged with the navigation of the steamer.

Enders v. *Steamer Henry Clay*, 30.

13. Where, in consequence of the neglect of the agents of a railway company to chain or put blocks under the wheels of cars left standing on a track, constructed on a pier used as a public highway, one, who was crossing the track at a point over which it was necessary for him to pass in order to reach his vessel, moored to the pier, is, during a dark night, and without any fault on his part, run over and seriously injured by the cars, which had been put in motion by a strong wind, he will be entitled to recover damages to the extent of the injury sustained. C. C. 2294, 2295.

Brown v. *Pontchartrain Railroad Company*, 45.

14. Where one employed by the lessee of a market to collect his dues, but not to superintend its police, causes a person to be arrested for making a disturbance in the market, the act not being within the scope of his authority as agent, cannot subject the principal to damages for any injury resulting therefrom. *Gerber* v. *Viosca*, 150.

15. To ascertain whether one employed by a corporation to superintend and direct the construction of a canal, had authority to enter into a particular contract relative to labor to be done in its construction, on behalf of his employers, all the facts and circumstances of the case should be taken into consideration. The authority to make such a contract need not be express and special; it may be inferred from circumstances, and the objects of the parties. *Miller* v. *Canal and Banking Company*, 236.

16. In an action on a contract alleged to have been executed by an agent of the defendants, the latter cannot object to the contract's being read in evidence, on the ground that the authority of the agent had not been proved; but if no authority be afterwards shown, or none can be properly inferred from the evidence, the contract will be of no avail. *Ib.*

AMENDMENT.

See SHERIFF, 5.

ANSWER.

See PLEADING, II.

APPEAL.

1. No appeal will lie to the Supreme Court from an order of the District Court, directing a mandamus to a parish judge commanding him to allow an appeal to the District Court from a judgment rendered by him on an opposition made under the stat. of 26th March, 1842, relative to lands divided into town lots. Such an order is not a final judgment in any case pending before the District Court. C. P. 566, 839. *Aliter*, had the mandamus been refused. *City of Lafayette* v. *Parish Judge of Jefferson*, 5.

2. No appeal will lie where the amount in controversy is less than three hundred dollars. *Saloy* v. *Ytasse*, 9.

3. Where the surety offered by a party to whom a suspensive appeal has been allowed, is insufficient, or has not been given in time to entitle him to a suspensive appeal, the order allowing the appeal should not be set aside, if the surety be sufficient, and the application was made in time, to entitle the party to a devolutive appeal. In such a case, the effect of the failure to comply with the requirements for a suspensive appeal, is to render it devolutive only, and to authorize the issuing of an execution.
Brode v. *Firemen's Insurance Company*, 38.

4. The stat. of 22 March, 1843, sec. 2, dispensing with notices of judgment in certain cases, does not apply to the case of a judgment against a garnishee, by whom interrogatories had been answered, rendered on a rule to show cause, where the rule was not served on the garnishee in consequence of his absence from the state; and where, in such a case, notice of judgment was subsequently served on the garnishee, the time within which an appeal will lie must be calculated from the date of the notice. *Ib.*

5. Where the record contains no statement of facts, bill of exceptions, or assignment of errors, and it is not certified by the judge, as required by art. 586 of the Code of Practice, and the certificate of the clerk does not show that it contains all the evidence introduced on the trial below, the appeal must be dismissed. *Second Municipality* v. *Martin*, 148.

6. Motions to dismiss appeals must be filed in writing before joinder in error or answer to the merits, or such preliminary objections will be considered as waived. *Shall* v. *Banks*, 168.

7. No judgment can be given on appeal, which the court, *a qua*, was incompetent to render. *Waggaman* v. *Zacharie—Rehearing*, 190.

See CRIMINAL LAW, XVIII.

ARREST OF JUDGMENT.

See CRIMINAL LAW, 15.

ASSAULT.

See CRIMINAL LAW, 11, 25.

ASSIGNMENT.

1. It was not the object of the English statute of 13th Eliz. ch. 5, to invalidate fair and *bona fide* transactions; nor is every conveyance which has the effect of delaying or hindering creditors, in itself fraudulent. It must be devised "of malice, fraud, covin, collusion or guile," to bring it within the statute. *United States* v. *Bank of United States*, 262.

2. Conveyances or assignments to one or more creditors for the security or satisfaction of a debt due by the grantor, are, *prima facie*, good, within the stat. of 13th Eliz. ch. 5. *Ib.*

3. By the laws of Pennsylvania, a debtor, whether insolvent or not, may make either a partial or general assignment of property, either in possession or in action, for the benefit of his creditors, and may prefer one to another. *Ib.*

4. An assignment of property, real or personal, to trustees for the benefit of the creditors of the assignor, legal and valid by the laws of the State in which it was made, and accompanied by delivery, will be respected in this State. Such contracts must be governed by the law of the place where they were executed. C. C. 10. C. P. 13. *Ib.*

5. By the laws of Pennsylvania, a corporation is as competent as a natural person to make an assignment for the benefit of creditors, and to give a preference to one or more creditors, even after insolvency. *Ib.*

6. The statute of Pennsylvania, of the 4th May, 1841, authorized the president, directors and company of the Bank of the United States, to dispense with the inventory and bond and surety required by the statute of 1836, in the case of a partial, as well as in that of a general assignment of its property for the benefit of its creditors. Ss. 19, 20. *Ib.*

7. The assignments made by the Bank of the United States, for the benefit of certain of its creditors, on the 7th June, and 4th and 6th September, 1841, are valid under the laws of that State, and sufficient to transfer the property of the bank in this State. *Ib.*

8. It is no objection to the validity of an assignment for the benefit of creditors, under the laws of Pennsylvania, that it has not been expressly accepted by them. Acceptance will be presumed where it is shown that the assignment was for their benefit, and there is no stipulation for a release of the debts, nor any thing calculated to delay the creditors unreasonably. *Ib.*

9. To entitle the United States under the act of Congress of 3d March, 1797, s. 5, to have any debt due to them first satisfied out of the property of an insolvent, where the latter has made a voluntary assignment for the benefit of his creditors, there must be an actual insolvency though not a declared one, and the assignment must have been a general one; but a party cannot, by assigning all his property by different acts, defeat the priority of the United States, under the pretext of the assignments being partial. *Ib.*

ATTACHMENT.

1. It is too late, after an appearance and answer by the defendants and a trial on the merits, to move to set aside an attachment.

Enders v. *Steamer Henry Clay*, 30.

2. Where in an action commenced by attachment against a steamer, its captain and owners, the names of the owners are not set forth in the petition, but defendants answer to the merits without pleading any exception, and, on judgment being rendered against them personally, execute an appeal bond disclosing their names, no objection can be made to the irregularity of a judgment *in personam* against them, on the ground of the omission to set out the names of the owners. *Ib.*

3. Where property attached is released on the execution of bond with surety, and the debtor makes a surrender of his property before judgment, after which the action is cumulated with the insolvent proceedings, and a judgment for the claim is entered up with the consent of the syndic, the surety will be discharged. *Per Curiam:* Had no bond been given, the property attached would not have been subject to satisfy the judgment rendered against the syndic, but would have formed a part of the general fund from which all creditors were to be paid. The bond represents the property attached, so far as the attaching creditor is concerned. If, under the judgment against the syndic, the attaching creditor could have had no privilege on the property seized, he can have no right upon the bond, as the property represented by it has gone to the benefit of the mass of the creditors.

Keyes v. *Shannon*, 172.

4. A garnishee cannot interfere, as to the merits of the case, between the plaintiff and defendant. *Brode* v. *Firemen's Insurance Company*, 244.

5. Where the master of a steamer, for the fraudulent purpose of aiding a debtor in removing his property into a foreign country beyond the reach of a creditor, conceals from the latter the fact of his having entered into an arrangement with the debtor for its removal, and, with a full knowledge of the rights of the creditor, transports the property out of the United States, thereby preventing the creditor from levying an attachment and saving his debt, he will be liable to the creditor for the amount of the debt, where it does not exceed the value of the property so removed.

Irish v. *Wright*, 428.

6. An attachment may be obtained though the debt be not due, provided the plaintiff make oath to the existence of the debt, and comply with the other requisites of the seventh section of the stat. of 7 April, 1826. C. P. 240, 242, 243. *Ib.*

7. After property attached has been bonded, and the case is at issue on the merits, it is too late to object to the attachment as irregular, in consequence of the suit being for damages. *Ib.*

ATTORNEY AT LAW.

1. A court may propound interrogatories to an attorney against whom an attachment has been issued for a contempt, for the purpose of ascertaining whether he was the author of the petition containing the contemptuous language for which the attachment was issued, and his intention and motive in writing it; and the court may require an answer to them. Nor is this right

a violation of the provision of the 18th sect. of the 6th article of the constitution, which declares, that "in criminal prosecutions no one shall be compelled to give evidence against himself." *State* v. *Soulé*, 500.

2. Contemptuous language contained in a petition, prepared by an attorney, for a re-hearing of a cause pending before the Supreme Court, though filed with the clerk without a formal motion in court, will subject the offender to punishment for a contempt. Stat. 27 March, 1823, § 3. Such a petition must necessarily pass under the notice of the court, while in session; and, being required by art. 912 of the Code of Practice to be presented when the court is in session, in the absence of proof to the contrary it will be presumed that it was filed according to law. *Ib.*

AUCTION.

See EVIDENCE, 15, 16.

AUTERFOITS ACQUIT.

See CRIMINAL LAW, 11.

BANK.

1. The cashier of a bank has, *prima facie*, authority to endorse, on behalf of the bank, negotiable paper held by it, in payment of its debts. *Per Curiam.* He is the general agent of the bank, through whom all its money transactions are conducted. His signature is generally considered to be that of the bank, in all its negotiations; and his endorsement will be presumed to be that of the bank, without its being necessary to show any special authority. *Merchants Insurance Company* v. *Chauvin*, 49.

2. The statute of Pennsylvania of the 4th May, 1841, authorized the president, directors and company of the Bank of the United States, to dispense with the inventory and bond and surety required by the statute of 1836, in the case of a partial, as well as in that of a general assignment of its property for the benefit of its creditors. Ss. 19, 20. *United States* v. *Bank of United States*, 262.

3. The assignments made by the Bank of the United States, for the benefit of certain of its creditors, on the 7th June, and 4th and 6th September, 1841, are valid under the laws of that State, and sufficient to transfer the property of the bank in this State. *Ib.*

4. The seventh section of the statute of the State of Mississippi, of the 21st February, 1840, which declares that, "it shall not be lawful for any bank in that State to transfer by endorsement, or otherwise, any notes, bills receivable, or other evidence of debt," did not impair any obligation contained in the charter of the Planters Bank of Mississippi, and is not a violation of any prohibition in the constitution of the United States. *Per Curiam:* The

statute does not impair the obligation of any contract existing between the bank and its debtors. It modifies the capacity of the bank to cede to another the right to inforce such contracts. Nor can the bank be said to have any vested right to make such a transfer, resulting from any contract with the State. The capacity of contracting is generally within the power of the Legislature, in reference to future contracts; and remedies may be modidified at its will. *Hyde* v. *Planters Bank*, 416.

BANK NOTE.

1. The destruction of a bank-note by fire, or otherwise, does not destroy the obligation of the bank to pay.

Wade v. *Canal and Banking Company*, 140.

2. Where in an action against a bank for the amount of notes alleged to have been destroyed by a fire which consumed the residence of the plaintiff, the evidence leaves no doubt of the destruction of the notes, plaintiff will be entitled to a judgment for their amount on the condition of executing a bond with surety, to indemnify the bank, in case it should afterwards appear that the notes were not so destroyed. *Ib.*

BANKRUPT.

1. Decision in *West* v. *His Creditors*, 5 Rob. 261, affirmed.

West v. *Creditors*, 123.

2. The bankrupt law of 1841 did not suspend the operation of the State insolvent laws, in cases in which proceedings had been commenced before its passage. *Ib.*

3. The District Court of the United States, sitting in bankruptcy under the act of Congress of 19 August, 1841, was authorized to cite persons holding mortgages, under the State laws on property surrendered by a bankrupt, and to order the erasure of their mortgages, when necessary for the settlement of the bankrupt estate. *Ducros* v. *Fortin*, 165.

4. Where one holding a mortgage on property surrendered by a bankrupt under the act of 19 August, 1841, though cited before the District Court of the United States in which the proceedings in bankruptcy were pending, to show cause why the property mortgaged should not be sold free of encumbrance, reserving his rights upon the proceeds, suffers the rule taken on him to be made absolute without opposition, he must be considered as having waived any right he may have had to oppose it, and he will be bound thereby. He cannot afterwards be permitted to set up his mortgage against a *bona fide* purchaser, who has bought on the faith of his apparent acquiescence.

Ib.

5. Decision in *Conrad* v. *Prieur*, 5 Robinson, 49, affirmed.

Benjamin v. *Prieur*, 193.

6. An impeachment of the certificate and discharge of a bankrupt under the act of Congress of 19 August, 1841, as having been "obtained in error and

fraud, the said bankrupt having fraudulently made payments, given securities, conveyances and transfers of his property, and made agreements in contemplation of bankruptcy, and for the purpose of giving certain creditors, endorsers and sureties, preference and priority over his general creditors, and over the plaintiff," is too vague and indefinite. It should have specified the particular error or fraud complained of. *Hazard* v. *Boykin*, 253.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. The holder of a note cannot recover on it, without proving the signatures of previous endorsers by whom he alleges that the note was transferred to him. He might have recovered against the makers, on proof of the endorsement of the payee, without proving the signatures of the subsequent endorsers, had he not set forth such endorsements, and claimed under them.

Hill v. *Buddington*, 119.

2. The holder of a note can strike out at the trial those endorsements only, which have not been stated in the petition. *Ib.*

3. Where a draft, drawn by one as agent for a succession, was accepted, on the faith of the succession and not of the agent personally, for the purpose of raising funds for the purchase of supplies for a plantation belonging to the succession, for the use of which the proceeds were applied, and the authority of the agent to contract for the succession is not denied, the agent cannot be made personally liable for the draft. The acceptance of the draft is an admission of the agent's right to draw in that capacity, and throws on the acceptors the burden of proving the want of authority.

Duncan v. *Barnard*, 138.

4. Payment by the drawees of the original of a bill, drawn in duplicate payable to order, made under a forged endorsement, is no defence to an action by the payee, against the drawer, on the protest of the duplicate for non-acceptance. The payment made on the forged endorsement was at the risk of those who made it.

Brown v. *Mechanics and Traders Bank*, 143.

5. Where the holder of a promissory note, who had commenced an action against the makers, releases, on the trial, one of his co-debtors, *in solido*, in order to use his testimony, but without expressly reserving his recourse against the other, the latter will be discharged. C. C. 2199. And where in such a case, the release erroneously recites that a judgment had been obtained against the witness, from all liability under which it releases him, the fact that no judgment had been rendered is immaterial, the plaintiff evidently intending by releasing the supposed judgment to release the debt itself.

Harrison v. *Poole*, 202.

6. Where a bill had been lost, but the drawees promised the owner to pay the amount out of the proceeds of property expected to be received from the drawer, and sufficient property was afterwards received by them, the acceptance became absolute on the receipt of the property. The drawer could not countermand his order, after the acceptance, though before the de-

livery of the property, so as to discharge the acceptors, without the consent of the owner of the draft.

Northern Bank of Kentucky v. *Leverich*, 207.

7. Where a lost bill was accepted verbally, with a knowledge of the fact of its loss, and the acceptors have treated with the plaintiffs as the holders, proof by a witness of the acknowledgment of the payee that he had transferred the bill to the plaintiffs, is sufficient evidence of their title. In such a case slight evidence of title should suffice. *Per Curiam:* The acknowledgment of the payee is not hearsay, but rather the admission of a party to the bill. It would, perhaps, not be good evidence, because secondary, if the bill itself could have been produced. *Ib.*

8. Where a bill of exchange has not been protested, interest is due only from judicial demand. *Ib.*

9. No action can be maintained by the syndic of an insolvent estate to recover from a third person the amount of certain notes given for the price of property belonging to the estate, on the allegations that the notes were illegally obtained by defendant from a former syndic, with full knowledge that the latter had no authority to dispose of them, and that he did so in fraud of the creditors of the insolvent, and that the amount of the notes was received by the defendant, where it is neither alleged nor proved that the former syndic has failed to account for the proceeds of the notes nor that any account has ever been demanded of him. *Nicholson* v. *Jacobs*, 233.

10. Delivery of the evidence of a debt is a sufficient delivery of the possession of it. Notice to the debtor is necessary in some cases; but not in transfers of bills of exchange or notes payable to order previous to maturity, nor afterwards, but to prevent the parties bound from acquiring equities against the holder, to which they might be entitled if not notified.

United States v. *Bank of United States*, 262.

11. Though the negotiability of a note secured by mortgage is not restricted, so far as the personal responsibility of the parties to it is concerned, by its being *paraphed*, *ne varietur*, by the notary, for the purpose of identifying it, and though want of consideration cannot be opposed to a transferee, for a valuable consideration, before maturity, who received it in the usual course of business, the mortgage given to secure the note does not partake of its negotiability. It is merely assignable, and is subject to all the equities existing between the original parties. *Per Curiam:* A mortgage cannot be transferred to a third person, so as to give him any greater right than the mortgagee himself possessed. *Schmidt* v. *Frey*, 435.

See BANK, 1. BANK NOTE.

BILL OF LADING.

A bill of lading is only *prima facie* evidence of the truth of its contents, as between the parties. *Kirkman* v. *Bowman*, 246.

CAPIAS AD SATISFACIENDUM.

An executor is not a public officer within the meaning of the 14th sect. of the stat. of 10 February, 1841. The office of executor is a private trust. C. C. 2687, 2788. Since the stat. of 28 March, 1840, abolishing imprisonment for debt, a *ca. sa.* cannot be taken out on the return of a *fi. fa.* unsatisfied, against one who has converted to his own use money received by him as executor. *Ex parte Powell*, 95.

CHURCH OF ST. LOUIS OF NEW ORLEANS.

1. A vacancy in the office of Curate of the Church of St. Louis of New Orleans, cannot deprive the corporation of the faculty of suing. The Curate is an *ex officio* member of the board of Wardens, having but one vote, like any other member, in its deliberations. Stat. 7 March, 1816. 22 March, 1822. *Wardens of Church of St. Louis* v. *Blanc*, 51.
2. The statutes of 7 March, 1816, and 22 March, 1822, incorporating "The Wardens of the Church of St. Louis of New Orleans," do not give the wardens a right to appoint, in the theological sense of the word, a curate, but only to provide for his salary; but they have a perfect right to withhold all salary from any person whatever, and even to prevent one claiming to be curate from entering the church belonging to the corporation. *Per Curiam:* The legislature have not, and could not, authorize the wardens to interfere in matters of mere church discipline and doctrine, nor constitutionally declare what shall constitute a curate in the Catholic acceptation of the word, without interfering in matters of religious faith and worship, and taking a first step towards a church establishment by law. *Ib.*
3. The wardens of the church of St. Louis of New Orleans are authorized to administer the temporalities of the church, and are responsible only to their constituents for the manner in which they may administer them. They cannot compel the bishop to institute a curate of their appointment; nor is he, in any legal sense, subordinate to the wardens of any one of the churches within his diocese, in relation to his clerical functions. *Ib.*

CHURCH OF ST. PATRICK OF NEW ORLEANS.

The pews in the Roman Catholic Church of St. Patrick of New Orleans, are a distinct property from the church itself, or the ground upon which it stands. Stat. 16 February, 1842, s. 4. *City Bank* v. *McIntyre*, 467.

CODES, ARTICLES OF, CITED, EXPOUNDED. &c.

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I. *Code of* 1808.

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3287. ——— *Guérin* v. *Rivarde*, 457.
3335, 3336, 3357. Mortgage. *Macarty* v. *Landreaux*, 130.
3424. Prescription. *Montgomery* v. *Levistones*, 145.
3490. *Guérin* v. *Rivarde*, 457.

III. *Code of Practice.*

13. Contracts, by what law governed. *United States* v. *Bank of United States*, 262.
92. Competency of judge. *Quimper* v. *Bierra*, 204.
122, 123. Actions against successions. *Succession of Durnford*, 488.
131, 132. Contempts of Court. *State* v. *Soulé*, 500.
140. Production of books and papers in possession of adversary. *Martinstein* v. *Creditors*, 6.
207. Days on which civil process cannot be served. *Irish* v. *Wright*, 428.
240, 242, 243. Attachment. *Ib.*
259. Attachment. *Enders* v. *Steamer Henry Clay*, 30.
279, 280. Sequestration. *Fink* v. *Martin*, 256.
367 to 373. Demands in compensation. *De Lizardi* v. *Hardaway*, 22.
379. Demands in warranty. *Howrin* v. *Clark*, 27.
385, 386. ——— *Succession of Durnford*, 488.
395, 396. Opposition of Third Persons. *Brown* v. *Cougot*, 14.
463. Setting cause for trial. *Hazard* v. *Boykin—Rehearing*, 254.
473. Production of books and papers in possession of adversary. *Martenstein* v. *Creditors*, 6.
533, 535. Judgment. *Hazard* v. *Boykin—Rehearing*, 254.
566. Appeal. *City of Lafayette* v. *Parish Judge of Jefferson*, 5.
586. ——— *Second Municipality* v. *Martin*, 148.
654, 655, 667. Sale under *fi. fa.* *Lamorandier* v. *Meyer*, 152.
684. Sale under *fi. fa.* *Fink* v. *Martin*, 256.
689, 690. Sale under *fi. fa.* *Commissioners of Bank of Orleans* v. *Hodge*, 450.
707. Sale under *fi. fa.* *La Gourgue* v. *Summers*, 175.
708. ——— *Leverich* v. *Prieur*, 97. *La Gourgue* v. *Summers*, 175.
710, 715. Sale under *fi. fa.* *La Gourgue* v. *Summers*, 175.
722. Sale under *fi. fa.* *Commissioners of Bank of Orleans* v. *Hodge*, 450.
839. Mandamus. *City of Lafayette* v. *Parish Judge of Jefferson*, 5.

912. Applications for rehearing before Supreme Court. *State* v. *Soulé*, 500.
989. Interest on claims against successions. *Succession of Durnford*, 488.

See CRIMINAL LAW, 3.

COMPENSATION.

1. Where the curator of a succession claims in his account rendered to the Probate Court, an amount as damages for an eviction from land sold to him by the deceased, the allowance of which is opposed by the heirs, the fact of the right to damages being unliquidated, will be no obstacle to their being claimed and allowed in compensation of any amount due by the curator to the succession. It is not necessary that the damages should have been previously liquidated in an action by the curator against the heirs.
Succession of Durnford, 488.
2. Pleading in compensation should be favored, as it tends to prevent the unnecessary multiplication of suits. *Ib.*
3. Appellant, while acting as curator of a vacant succession, was evicted from land purchased by him from the deceased, and in his account he credited himself with the amount claimed as damages for the eviction. On an opposition by the heirs, on the ground of prescription: *Held*, that until they appeared and claimed the succession the curator was its legal representative, and could not enforce a demand, in his own favor, against it; and that to the extent of the funds in his hands, his claim was compensated, and might be opposed to the claims of the heirs by way of exception, even if incapable of being enforced in a direct action. *Ib.*

CONFLICT OF LAWS.

Personal property has no locality, and the law of the owner's domicil will, in all cases, determine the validity of its transfer or alienation, unless there be some positive or customary law of the country in which it is situated to the contrary. *United States* v. *Bank of United States*, 262.

CONSTITUTION.

1. In framing the State Constitution of 1812, it was deemed unnecessary to insert any restriction upon the power of the legislature on the subject of religious sentiments or worship, as it had already been settled, by solemn compact between the original states and the people of the territory, unalterable but by common consent, under the act of congress of 2d March, 1805, and in conformity with the ordinance of that body of 13th July, 1787, that religious freedom, in its broadest sense, should form the basis of all laws, constitutions and governments which forever after might be formed within said territory. *Wardens of Church of St. Louis* v. *Blanc*, 51.
2. A very strong case must be made out, to induce the court to declare a law

of a neighboring State unconstitutional, especially when it appears that the purpose of the law was in a great measure remedial.

Hyde v. *Planters Bank*, 416.

3. The court will not, in any case of serious doubt as to the constitutionality of a law, pronounce it void. *Ib.*

4. A court may propound interrogatories to an attorney against whom an attachment has been issued for a contempt, for the purpose of ascertaining whether he was the author of the petition containing the contemptuous language for which the attachment was issued, and his intention and motive in writing it; and the court may require an answer to them. Nor is this right a violation of the provision of the 18th sect. of the 6th article of the constitution, which declares, that "in criminal prosecutions no one shall be compelled to give evidence against himself." *State* v. *Soulé*, 500.

See CRIMINAL LAW, 4, 8, 17, 26, 54, 61, 84.

CONTEMPT OF COURT.

1. Where the evidence of a contempt of court is before the court, and the offence palpable, a rule to show cause why an attachment should not be issued, is unnecessary. In such a case an attachment may be issued in the first instance. The practice of taking a rule, arose out of a distinction between direct and consequential contempts, and was resorted to, where it became necessary to procure evidence not before the court.

State v. *Soulé*, 500.

2. A court may propound interrogatories to an attorney against whom an attachment has been issued for a contempt, for the purpose of ascertaining whether he was the author of the petition containing the contemptuous language for which the attachment was issued, and his intention and motive in writing it; and the court may require an answer to them. Nor is this right a violation of the provision of the 18th sect. of the 6th article of the constitution, which declares, that "in criminal prosecutions no one shall be compelled to give evidence against himself." *Ib.*

3. Contemptuous language contained in a petition, prepared by an attorney, for a rehearing of a cause pending before the Supreme Court, though filed with the clerk without a formal motion in court, will subject the offender to punishment for a contempt. Stat. 27 March, 1823, § 3. Such a petition must necessarily pass under the notice of the court, while in session; and, being required by art. 912 of the Code of Practice to be presented when the court is in session, in the absence of proof to the contrary it will be presumed that it was filed according to law. *Ib.*

CONTRACTS.

I. *Parties to, and Consent necessary to Form.*

II. *Execution and Proof.*

III. *Object and Consideration.*
IV. *Interpretation.*
V. *Joint, and In Solido.*
VI. *Putting in Default.*
VII. *Extinction.*

I. *Parties to, and Consent necessary to Form.*

1. By the laws of Pennsylvania, a corporation is as competent as a natural person to make an assignment for the benefit of creditors, and to give a preference to one or more creditors, even after insolvency.
United States v. *Bank of United States*, 262.

2. It is no objection to the validity of an assignment for the benefit of creditors, under the laws of Pennsylvania, that it has not been expressly accepted by them. Acceptance will be presumed where it is shown that the assignment was for their benefit, and there is no stipulation for a release of the debts, nor any thing calculated to delay the creditors unreasonably. *Ib.*

3. The seventh section of the statute of the State of Mississippi, of the 21st February, 1840, which declares that, "it shall not be lawful for any bank in that State to transfer by endorsement, or otherwise, any notes, bills receivable, or other evidence of debt" did not impair any obligation contained in the charter of the Planters Bank of Mississippi, and is not a violation of any prohibition in the constitution of the United States. *Per Curiam:* The statute does not impair the obligation of any contract existing between the bank and its debtors. It modifies the capacity of the bank to cede to another the right to enforce such contracts. Nor can the bank be said to have any vested right to make such a transfer, resulting from any contract with the State. The capacity of contracting is generally within the power of the Legislature, in reference to future contracts; and remedies may be modified at its will. *Hyde* v. *Planters Bank*, 416.

4. No one can be said to have any vested right in any existing legal capacity in reference to any future contract, or advantage to result from that capacity. The capacity or incapacity of particular classes of persons to contract, or to inherit, depends upon the legislative will. *Ib.*

5. After a wife has obtained a separation of property, or a separation from bed and board carrying with it a separation of property, she may alienate any property formerly dotal, and, consequently may ratify any alienation made before the separation. Code of 1808, book 3, tit. 5, arts. 36, 41, 42, 97; tit. 20, art. 59. C. C. 2337, 2342, 2343, 2355, 2410, 2411, 2421, 3490. *Guérin* v. *Rivarde*, 457.

II. *Execution and Proof.*

6. Where in an action against a bank for the amount of notes alleged to have been destroyed by a fire which consumed the residence of plaintiff, the evidence leaves no doubt of the destruction of the notes, plaintiff will be entitled to a judgment for their amount on the condition of executing a bond,

with surety, to indemnify the bank, in case it should afterwards appear that the notes were not so destroyed. *Wade* v. *Canal and Banking Company*, 140.

7. Where the law requires a contract to be in writing, the power to execute it must be in writing also; but where this is not required, the power may be in the simplest form, and the intention of the parties may be gathered, as much from their acts, as from their agreements.

Miller v. *Canal and Banking Company*, 236.

8. A claim on which suit has been instituted, or a judgment, may be transferred verbally. Such transfers may be proved by witnesses; and where the amount of the claim, or judgment, exceeds five hundred dollars, the transfer may be established by one witness and corroborating circumstances.

Succession of Delassize, 259.

9. The notice to be given to the debtor to render the transfer of a claim or judgment binding upon third persons, is not required to be in any particular form. It is enough that it be such as to inform him of the fact that his former creditor is divested of all his rights to the thing assigned. Such notice may be proved like any other fact, according to the established rules of evidence; and one witness is sufficient, whatever be the value of the claim or judgment transferred. *Ib.*

10. Delivery of the evidence of a debt is a sufficient delivery of the possession of it. Notice to the debtor is necessary in some cases; but not in transfers of bills of exchange or notes payable to order previous to maturity, nor afterwards, but to prevent the parties bound from acquiring equities against the holder, to which they might be entitled if not notified.

United States v. *Bank of United States*, 262.

III. *Object and Consideration.*

11. The relation between a bishop and the wardens of a church implies no civil contract, and consequently gives rise to no civil obligation. It is not a "contract having for its object the gratification of any intellectual enjoyment, whether in religion, morality, or taste, or any convenience or other legal gratification," within the meaning of art. 1928, § 3, of the Civil Code.

Wardens of Church of St. Louis v. *Blanc*, 51.

12. When the law incapacitates persons from making certain contracts, the form of the contract cannot prevent their being allowed to prove the real nature of the transaction by parol evidence, or other proof going to contradict the contents of the acts, and tending to show that the parties intended to evade the provisions of the law; as where a wife binds herself as principal, though the object was to bind her as surety, for the repayment of money received and used by her husband for his exclusive benefit.

Waggaman v. *Zacharie*, 181.

13. It was not the object of the English statute of 13th Eliz. ch. 5, to invalidate fair and *bona fide* transactions; nor is every conveyance which has the effect of delaying or hindering creditors, in itself fraudulent. It must be devised "of malice, fraud, covin, collusion or guile," to bring it within the statute. *United States* v. *Bank of United States*, 262.

14. Conveyances or assignments to one or more creditors for the security or

satisfaction of a debt due by the grantor, are, *prima facie*, good, within the stat. of 13th Eliz. ch. 5. *Ib.*

15. By the laws of Pennsylvania, a debtor, whether insolvent or not, may make either a partial or general assignment of property, either in possession or in action, for the benefit of his creditors, and may prefer one to another. *Ib.*

16. An assignment of property, real or personal, to trustees for the benefit of the creditors of the assignor, legal and valid by the laws of the State in which it was made, and accompanied by delivery, will be respected in this State. Such contracts must be governed by the law of the place where they were executed. C. C. 10. C. P. 13. *Ib.*

17. The assignments made by the Bank of the United States, for the benefit of certain of its creditors, on the 7th June, and 4th and 6th September, 1841, are valid under the laws of that State, and sufficient to transfer the property of the bank in this State. *Ib.*

18. Personal property has no locality, and the law of the owner's domicil will, in all cases, determine the validity of its transfer or alienation, unless there be some positive or customary law of the country in which it is situated to the contrary. *Ib.*

19. To entitle the United States under the act of Congress of 3 March, 1797, s. 5, to have any debt due to them first satisfied out of the property of an insolvent, where the latter has made a voluntary assignment for the benefit of his creditors, there must be an actual insolvency though not a declared one, and the assignment must have been a general one; but a party cannot by assigning all his property by different acts, defeat the priority of the United States, under the pretext of the assignments being partial. *Ib.*

IV. *Interpretation.*

20. Where a contract between a mortgagor and his mortgage creditors recites, that the former "shall be at liberty to sell any part of the mortgaged property, on paying to their agent a proportion of the purchase money equal to the proportion which the whole mortgaged security bears to the whole mortgage debt, and that thereupon their agent shall release the mortgage on the property so sold," the agent is authorized to release the mortgage only in the event of his having previously received the stipulated portion of the price of the part so sold. *Sewell* v. *Hennen*, 216.

V. *Joint and In Solido.*

21. There must be an express stipulation in a contract of sale, to render joint purchasers liable, *in solido*, or as sureties for each other, for the price. Such liability cannot be presumed. *Kohn* v. *Hall*, 149.

VI. *Putting in default.*

22. Where in the sale of property subject to mortgages, it was stipulated that the mortgages should be erased within the shortest delay, and that the notes given for the price should be deposited with the cashier of a certain bank,

there to remain till the erasure of the mortgages, when they were to be delivered to the vendor, a demand, made on the vendor personally at his domicil, to comply with his obligation to erase the mortgages, is sufficient to put him *in mora*. It was not necessary to make any demand of the cashier at the bank. *Sewell* v. *Hennen*, 216.

VII. *Extinction.*

23. One who suffers a judgment to be rendered against him, without pleading in compensation a debt which he might have opposed to his adversary's demand, does not thereby lose his right of action against the plaintiff for the amount of the debt; but he must institute a separate action therefor, before the court having jurisdiction over the plaintiff's domicil.

De Lizardi v. *Hardaway*, 22.

24. The destruction of a bank-note by fire, or otherwise, does not destroy the obligation of the bank to pay.

Wade v. *Canal and Banking Company*, 140.

CORPORATION.

1. A corporation cannot maintain an action for slander.

Wardens of Church of St. Louis v. *Blanc*, 51.

2. No express authority in the charter of a corporation is necessary to authorize it to make a promissory note, in the course of its legitimate business.

Brode v. *Firemen's Insurance Company*, 244.

3. A creditor who has obtained judgment against a corporation and issued execution thereon, may propound interrogatories to any stockholder, under the 13th section of the stat. of 20 March, 1839, to ascertain whether the whole amount of his stock-subscription has been paid in; and if any portion be unpaid, it may be seized by the creditor in satisfaction, as far as it will go, of his judgment. The fact of other stockholders having paid less than their proportion, is a matter to be settled between the stockholders themselves. *Ib.*

4. By the laws of Pennsylvania, a corporation is as competent as a natural person to make an assignment for the benefit of creditors, and to give a preference to one or more creditors, even after insolvency.

United States v. *Bank of the United States*, 262.

COURTS.

Where the curator of a succession claims in his account rendered to the Probate Court, an amount as damages for an eviction from land sold to him by the deceased, the allowance of which is opposed by the heirs, that court has jurisdiction of the questions whether there was a warranty and eviction, and as to the amount of the damage. A Probate Court may inquire into the title to real estate, when necessary to enforce its admitted jurisdiction. Nor will the fact of the right to damages being unliquidated, be any obstacle to their being claimed and allowed in compensation of any amount due by the

curator to the succession. It is not necessary that the damages should have been previously liquidated in an action by the curator against the heirs. *Succession of Durnford*, 488.

See BANKRUPT, 1, 2, 3, 5.

CRIMINAL LAW.

I. *English Criminal Law, how far adopted.*
II. *Statutes relative to Criminal Offences, and Interpretation thereof.*
III. *Felony.*
IV. *Homicide.*
V. *Rape.*
VI. *Assault with Dangerous Weapon, or with Intent to Kill.*
VII. *Larceny*
VIII. *Forgery.*
IX. *Perjury.*
X. *Prosecutions by Indictment.*
XI. *Plea of Auterfoits Acquit.*
XII. *Nolle Prosequi.*
XIII. *Jury and Verdict.*
XIV. *Evidence.*
XV. *New Trial.*
XVI. *Arrest of Judgment.*
XVII. *Judgment.*
XVIII. *Appeal.*

I. *English Criminal Law, how far adopted.*

1. The Legislature in providing by the sec. 33 of the stat. of 4 May, 1805, that "all the crimes, offences, and misdemeanors hereinbefore named, shall be taken, intended and construed according to and in conformity with the law of England; and the forms of indictment (divested however of unnecessary proxility,) the method of trial, the rules of evidence, and all other proceedings whatsoever in the prosecution of the said crimes, offences and misdemeanors, changing what ought to be changed, shall be, except as is by this act otherwise provided for, according to the said common law," must be understood as having adopted that system of law as it existed in 1805, modified, explained and perfected by statutory enactments, so far as those enactments are not inconsistent with the peculiar character and genius of our institutions. *State* v. *McCoy*, 545.

II. *Statutes relative to Criminal Offences, and Interpretation thereof.*

2. The acts of the Legislature, in 1806, were passed in both the English and French languages, both being texts; and they must be construed the one by the other—as parts of a whole, and not as distinct acts or expressions of the legislative will. *State* v. *Moore*, 518.
3. The Code of Practice has no application to criminal prosecutions. *Ib.*
4. Anterior to the constitution, the laws of the territory were passed and promulgated in both the English and French languages; and the act in one language was entitled to as much respect as in the other; but that instrument having provided, by the 15th sect. of the 6th art., that "all laws that may be passed by the Legislature, shall be promulgated and preserved in the language in which the constitution of the United States is written," in the construction of statutes passed since its adoption, the language of the English text, when unambiguous, cannot be controlled by the French translation. *State* v. *Mix*, 549.

III. *Felony.*

5. The term *felony* is unknown to the laws of this State. *State* v. *Charlot*, 529.

IV. *Homicide.*

6. The killing a slave, like that of a free person, may be either murder or manslaughter according to the circumstances of the case; and both offences are punishable by the laws of this State. The 16th section of the stat. 7 June, 1806, was enacted for the purpose of removing all doubt on this subject. *State* v. *Moore*, 518.
7. The second section of the stat. of 20 March, 1818, punishing the crime of manslaughter, applies to the offence when committed on a slave, as well as on a free person. *Ib.*
8. The provision of the first section of the stat. of 20 March, 1818, that on trials for murder, the jury may find the prisoner guilty of manslaughter, is not inconsistent with the 18th sect. of the 6th art. of the constitution. *Ib.*
9. Where the mortal stroke by which a murder was effected, was given in one parish and the death occurred in another parish in this State, the crime must be prosecuted in the parish in which the death occurred. But where the mortal stroke was given in this State, but the death occurred in another State, the crime may be inquired of in the parish where the stroke was inflicted. *State* v. *McCoy*, 545.

See 23, 24, 26, 27, 28, 35, 40, 46, 48, 73, 75, *infra.*

V. *Rape.*

10. A slave may be convicted of the crime of rape, under the 7th sect. of the stat. of 7 June, 1806, on proof of his having attempted to have carnal intercourse with a white female child under ten years of age. *State* v. *Bill*, 527.

VI. *Assault with Dangerous Weapon, or with Intent to Kill.*

11. The 5th sect. of the stat. of 7 February, 1829, which declares, that "whoever shall, with a dangerous weapon, or with intent to kill, inflict a wound less than mayhem, upon another, shall, on conviction, be imprisoned." &c., was intended to provide punishment for two distinct offences: that of assaulting with a dangerous weapon, and that of assaulting with intent to kill. The language is free from ambiguity, and cannot be affected by the French translation. *State* v. *Mix*, 549.

See 25, *infra*.

VII. *Larceny.*

12. In a prosecution for larceny, proof that the offence was committed on the precise day charged in the indictment is unnecessary. *State* v. *Charlot*, 529.
13. In a prosecution for larceny, proof that the offence was committed on the day charged in the indictment, is not necessary. It is sufficient if it be shown to have been committed at any time within a year previous to the finding of the indictment. *State* v. *Clark*, 533.
14. Where one has been notified of a design to steal his goods, which he neither originated nor suggested, he may, in order to detect the thief, direct a servant or agent, to encourage the design, and afford facilities for the completion of the crime; and such facilities will not affect the criminality of the thief. *State* v. *Duncan*, 562.

See 19, 62, 68, *infra*.

VIII. *Forgery.*

See 20, 21, *infra*.

IX. *Perjury.*

See 30, 39, *infra*.

X. *Prosecutions by Indictment.*

15. The incompetency of some of the grand jurors by whom a bill of indictment has been found, is not cured by the omission to urge the objection on the first day of the term of the District Courts in the country parishes. The 5th sect. of the stat. of 6 March, 1840, applies only to the formalities to be observed in the summoning, formation, and drawing of the grand jury, not to the want of qualification of any member of the jury. But an objection founded on such want of qualification is inadmissible on a motion in arrest of judgment, where the party is confined to matters apparent on the record. Nor will a demurrer on the part of the State to a motion in arrest of judgment, made on the ground of such want of qualification, though amounting to an admission of the want of qualification, obviate the objection that the error complained of was not apparent on the face of the record.

State v. *Nolan*, 513.

16. An indictment which charges an offence to have been committed "at the parish of C——" is sufficient. The omission to designate a particular place within the parish, and the use of the word *at* for *in*, are immaterial. The offence is properly charged to have been committed within the *parish* instead of within a county. *Ib.*

17. An indictment commencing "State of Louisiana, Parish of, &c." which recites that, "The grand jurors for the State of Louisiana, &c., acting in the name and by the authority of the State," &c., is a sufficient compliance with sect. 6, of art. 4 of the constitution, requiring all prosecutions to be carried on in the name and by the authority of the State.

State v. *Moore*, 518.

18. It is sufficient in an indictment, to charge that an offence was committed in a particular parish; no further designation of the place is necessary. An averment that the offence was committed *at* a parish is equivalent to *in* the parish. *Ib.*

19. In an indictment for larceny of a cow, a description of the animal by its kind, color and sex is sufficient. The sufficiency of such a description is not affected by any thing in the stat. of 20 March, 1827, relative to the branding of animals in certain parishes. *State* v. *Charlot*, 529.

20. As a general principle, an indictment for forgery or counterfeiting, or uttering forged or counterfeited bills, must contain an exact copy or recital of the bill, where the prosecuting attorney attempts to set it out by its tenor; but where, from the difficulty of ascertaining a particular word, the prosecuting attorney attempted to make a *fac-simile* of it, the indictment will be good. *State* v. *Sheldon*, 540.

21. In an indictment for uttering a forged bank-bill, though the prosecuting officer attempted to set it out by its tenor, he is not bound to set forth words written in the margin of the bill; and where, in attempting to do so, the indictment recites that the bill contained the words *cinquante piastres* on the right hand of the vignette, while it actually contained the words *cinquante gourdes*, the statement will be regarded as surplusage, and the variation as immaterial. *Per Curiam:* In indictments for forgery it is unnecessary to set forth the ornamental parts of the bill, as the devices, mottoes, &c. *Ib.*

22. It is not necessary that all the counts of an indictment should be written upon the same sheet of paper, nor when on separate sheets, that they should be attached together. *State* v. *Lennon*, 543.

23. It is unnecessary in an indictment for murder to state the length, breadth, or depth of the wounds. The term *mortal* is indispensable in describing the bruise or wound; but when so described, an adequate cause of death is assigned, which will be supported by evidence of any deadly wound or bruise. It has never been required to prove either a wound or bruise as laid.

State v. *McCoy*, 545.

24. Where an indictment for murder alleges the infliction of "several mortal bruises and wounds in and upon the right side of the head, also in and upon the stomach, back and sides" of the deceased, it is a sufficient description both of the character and locality of the wounds. *Ib.*

25. An indictment which charges a prisoner with "having unlawfully and feloniously, with a certain dangerous weapon, commonly called a life-protector, assaulted," &c., contains a sufficient description of the weapon, with which the assault was alleged to have been committed, using the very words of the statute of 7 February, 1829, s. 5. The use of the word *feloniously*, cannot vitiate the indictment. It may be rejected as surplusage.
State v. *Mix*, 549.

26. The omission, in an indictment for murder, of one or more letters in a word, which does not change the word into another of a different signification, will not vitiate the indictment; nor will it be fatal under the 15th sect. of the 6th art. of the constitution, which requires all judicial proceedings to be conducted in the language of the constitution, that such omission changes the word to a French term of the same meaning as that intended to be used, as where the indictment charges that the mortal blow caused "an *extravasion* (for extravasation) of blood, &c." *State* v. *Hornsby*, 554.

27. The omission, in an indictment for murder, of one or more letters in a word, where the whole word might be rejected as surplusage, is immaterial.
Ib.

28. It is unnecessary, in an indictment for murder, to state the length, breadth, or depth of the wound. The term mortal is indispensable in describing the wound or bruise, but when so described and an adequate cause of death is assigned, which will be supported by evidence of any deadly wound or bruise, it has never been required to prove either a wound or a bruise as laid. *Ib.*

29. The words "a true bill," as well as the capacity of the foreman, may be endorsed on an indictment by any person, under the direction of the grand jury. It is only necessary, that the finding should be signed by the foreman.
State v. *Duncan*, 562.

30. Where in a prosecution for perjury, the indictment charges that the perjury consisted in the prisoner's falsely swearing that "*shortly after* the assault and battery committed by P. on the body of D., M. took the said D. by the collar, threw him down and kicked him;" and negatives the truth of the oath by averring, that "in truth and in fact the said M., *after* the assault and battery committed by P. upon the body of the late D., did not take the said D. by the collar, nor throw him down, nor kick him, nor commit any battery on him," it is sufficient. It was not material to the issue to negative any assault or violence to the person of D. *anterior* to the assault and battery committed by P. *State* v. *Brown*, 566.

31. It is not necessary, either in England or in this State to mention in an indictment the name of the court in which it was found; consequently, where the style of the court is inaccurately given in the commencement and statement of an indictment, it will be disregarded as surplusage.
State v. *Kennedy*, 591.

32. The caption forms no part of an indictment. It is a separate act, not submitted to nor acted on by the grand jury, preferring no charge against the accused, and never appears on the record till the bill has been found, and

generally not until the indictment has been removed for trial to a higher tribunal, by writ of error or *certiorari*. Its principal object is to show that the inferior tribunal had jurisdiction of the offence, and owes its origin to the peculiar organization of the English courts. In this State, where the same court before which an indictment is found must try it, no caption is necessary or required. *Ib.*

33. In an indictment the venue, that is, the parish in which the offence was committed, must be stated, in order that the court may know whether it has jurisdiction. *Ib.*

34. In indictments for offences termed felonies at common law, the time when the offence was committed must be stated with such certainty that no doubt can be entertained of the period really intended. Any uncertainty in the averment of time and place will vitiate the indictment. This averment must be repeated as to every issuable fact; when they have been once set forth with certainty, they may, in every subsequent averment, be referred to by the words *then* and *there*, which are equivalent to a repetition of the time and place. *Ib.*

35. In an indictment for murder, the material facts are the mortal stroke and consequent death, and the death must appear to have occurred within a year and a day after the mortal stroke. The averment of each of these material facts must be accompanied by an allegation of a certain time and place: thus, where an indictment for murder, after stating the mortal blow, with the usual averments of time and place, proceeds: "Of which mortal wound so given by the said K. with the deadly weapon aforesaid, to the said W., the said W. did then and there suffer and languish and languishing did live, and, a few hours after did die of the said mortal wound," the averment of the time and place of the death is insufficient; and the defect is not cured by a verdict. *Per Curiam:* The words "*then* and *there*" immediately precede and refer to the words "languished and languishing did live," and not to the allegation "and a few hours after did die." The copulative *and* is insufficient to connect the time and place with the death. The facts of time and place must be precisely and distinctly stated; they cannot be inferred. Nor will the averment in the conclusion of a correct time and place of death, cure this defect; on the contrary, it will render it repugnant to the statement. *Ib.*

36. The stat. of 4 May, 1845, s. 33, which provides that "the forms of indictments, (divested, however, of unnecessary prolixity,) the method of trial, rules of evidence and all other proceedings whatsoever in the prosecution of said crimes, offences and misdemeanors, changing what ought to be changed, shall be, except as otherwise provided for, according to the common law," did not intend to confer upon the courts authority to legislate on the subject of criminal proceedings or the framing of indictments, but merely to direct prosecuting officers to omit those prolixities acknowledged to be such at common law, and unnecessary, though habitually inserted in indictments; and the changes directed to be made, are those necessary to make our proceedings conform to our own laws and form of government. What-

ever has been determined to be an essential averment in an indictment at common law, will be deemed necessary here, unless a statute of the State has removed the reason, and with it the necessity for the allegation. *Ib.*

37. The incompetency of one of the grand jurors by whom a bill of indictment has been found, is not cured by the omission to urge the objection on the first day of the term of the district courts in the country parishes. The 5th sec. of the stat. of 6 March, 1840, applies only to the formalities to be observed in the summoning, formation and drawing of the grand jury, and not to the want of qualification in any of its members. *State* v. *Jones*, 616.

38. The incompetency of any one member of a grand jury by whom an indictment has been found, will vitiate the whole proceeding, no matter how many unexceptionable jurors joined with him in finding it. *Ib.*

XI. *Plea of Auterfoits Acquit.*

39. On a trial for perjury, the prosecuting attorney, after opening the case on the merits and being followed by the counsel for the prisoner, discovered a defect in the indictment, and moved the court for leave to enter a *nolle prosequi*, which was granted, and the jury was discharged and the prisoner remanded to jail. Another indictment having been found against the prisoner for the same offence : *Held*, that no verdict of guilty or not guilty having been rendered, there was no trial ; and that the entering of the *nolle prosequi*, and the discharge of the jury without the consent of the prisoner, could not support a plea of *auterfoits acquit*. *Per Curiam :* To render the plea of a former acquittal a bar, it must be a legal acquittal, by judgment upon trial, for substantially the same offence, by a verdict of a petit jury. *State* v. *Brown*, 566.

40. Where on an indictment for murder, the jury find the prisoner guilty of manslaughter, and a new trial is awarded to the latter, the prosecuting attorney may enter a *nolle prosequi* as to the charge of murder, and prefer a new indictment for manslaughter, without thereby acquitting the prisoner of the last offence. But the verdict of manslaughter is a virtual acquittal of the charge of murder, for which the prisoner cannot be again tried. *State* v. *Hornsby*, 583.

41. To render a plea of a former acquittal a bar, it must be a legal acquittal, by judgment upon trial, for substantially the same offence, by a verdict of a petit jury. *Ib.*

XII. *Nolle Prosequi.*

42. A *nolle prosequi* amounts neither to an acquittal nor pardon. It is simply the discharge of the particular indictment as to which it is entered, and is no bar to a future indictment for the same offence. *State* v. *Hornsby*, 583.

43. At any time before a jury is empannelled, the prosecuting attorney may enter a *nolle prosequi*, without the consent of the court or of the accused ; but where the jury has been charged with the trial of a case, this right cannot be exercised against the will of the court, which will not consent to its

exercise where the defence appears ample, or the motion not likely to promote the ends of justice. *Ib.*

XIII. *Jury and Verdict.*

44. In criminal proceedings no foreman is appointed to the jury. *State* v. *Nolan*, 513. *State* v. *Moore*, 518.

45. In criminal proceedings it is not necessary that the verdict should be signed. *State* v. *Nolan*, 513.

46. Where on an indictment for murder the jury find the prisoner guilty of manslaughter, it is not necessary that the verdict should expressly negative the murder, nor declare whether the manslaughter was voluntary or involuntary, the law making no difference in the punishment of voluntary or involuntary manslaughter. *State* v. *Moore*, 518.

47. In criminal proceedings it is not necessary that the verdict should be written upon the indictment or signed by the foreman of the jury. It is sufficient that a verdict be delivered orally, in open court, when it is recorded. *Ib.*

48. As every indictment for murder contains virtually an accusation of manslaughter, a verdict on such an indictment, finding the prisoner "guilty of manslaughter in manner and form as charged" is strictly correct. *Ib.*

49. Slaves charged with capital offences are entitled to be tried by an impartial jury. They have no right to challenge a juror peremptorily; but their right to challenge for cause is the same as that of free persons. *State* v. *George*, 535.

50. To disqualify a juror on the ground of his having formed an opinion as to the guilt of the accused, his opinion must have been deliberately formed. Light impressions, which may be fairly supposed to yield to the testimony that may be offered, and which leave the mind open to a fair consideration of it, are no sufficient objection to a juror; but those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, and which will combat and resist its force, constitute a sufficient objection. *Ib.*

51. Where the extent of the punishment of an offence is left to the discretion of the jury, the fact that one offered as a juror has made up his mind as to the measure of punishment which should be awarded to the accused in case of conviction, is a sufficient cause to reject him. *Ib.*

52. Where on the trial of a slave charged with a capital offence, the parish judge remained with the jury, after they had retired to deliberate on their verdict, in order to read to them the testimony, which he had reduced to writing so illegibly that they were unable to decipher it, but afterwards withdrew, and subsequently returned, at their request, and wrote out their verdict, these acts, though irregular, will not vitiate a verdict, where it does not appear that the judge availed himself of his presence among the jury to participate in the proceedings. *Per Curiam:* The jury should have been brought into court, and the testimony read to them there; and, when pre-

pared to render their verdict, if unable to write it themselves, it should have been written in open court, by the clerk or judge, under their direction. *Ib.*

53. In capital cases a jury should not be permitted to separate, after they have been sworn, whether the prisoner consent or not. In cases not capital, courts may, in their discretion, permit the jury to separate, before they have received the charge of the court, but not after the charge has been given. In cases not capital, misconduct on the part of the jury, where they have been permitted to separate, will cause their verdict to be set aside; in capital cases, where they have separated, misconduct and abuse will always be presumed, and a new trial ordered. *State* v. *Hornsby*, 554.

54. The stat. of 26 January, 1844, exempting the inhabitants of the parish of Rapides, residing on the west side of the river Calcasieu and bayou Sépa, from serving as jurors, cannot be considered as infringing the right secured by sect. 18 of art. 6 of the constitution to persons prosecuted in that parish by indictment or information, of having a trial by an impartial jury of *the vicinage*. *State* v. *Jones*, 573.

55. Where a jury in a criminal case is put in charge of a sheriff or his deputy, it is not necessary that either should be specially sworn to keep them together, and not to speak to them except to ask them if they are agreed, nor to permit others to speak to them. The duty of the sheriff, or his deputy, in such a case is an official one, which they having been already sworn to perform, no additional oath is necessary. *State* v. *Kennedy*, 590.

56. Where on a trial for murder, a person offered to be sworn as a juror answers on his *voir dire*, that he has conscientious scruples against finding a verdict of guilty in any case involving the life of the accused, he may, on the principles of the common law, independently of any statutory enactment, be set aside for cause. *Ib.*

57. Where twelve months have not elapsed between the time when a juror first determined to fix his residence in this State, and the date of the formation of the *venire*, he is incompetent, not having resided twelve months within the State, as required by law. The twelve months commence only from the date of the determination to reside within the State, though the party may have been within it for many months previously. *Ib.*

58. An objection to a juror on account of want of residence should be made when the juror is offered to be sworn. Where no inquiry is made of the juror on his *voir dire*, as to his residence, any objection on that account will be too late on a motion for a new trial. *Aliter*, when, on being interrogated, he states that he possesses any qualification, and the statement is afterwards found to be false. *Ib.*

XIV. *Evidence.*

59. The statutes of 7 June, 1806, (s. 1,) and of 19 February, 1835, (s. 1,) which prescribe the mode of trial of slaves charged with capital offences, requiring that the judge and freeholders shall be of the parish in which the offence was committed, the venue constitutes, in such prosecutions, as in

other ordinary criminal prosecutions, a substantive charge, and it must be specially proved. *State* v. *George*, 535.

60. Where one charged with a criminal offence is described as a slave, and with the assistance of his owner, submits, without objection, to be tried as such, it is such an admission of his condition, as will prevent him from requiring the judge to charge the jury that the fact of his being a slave should be proved to warrant a verdict of guilty. *Per Curiam:* It was such an admission of his condition as he could not contradict at that stage of the prosecution. He should have made the issue before going to trial on the merits, or have availed himself of it after verdict. *Ib.*

61. Sect. 18, art. 6, of the constitution, having provided that, "in all criminal prosecutions the accused shall have the right of meeting the witnesses face to face and of having compulsory process for obtaining witnesses in his favor," the failure of the Legislature to invest the courts of original criminal jurisdiction with power to coerce the attendance of witnesses residing within the State beyond the limits of their respective territorial jurisdictions, cannot deprive the accused of his right, under the constitution, of having his witnesses heard, whether found within or beyond such limits; and as he is entitled to a speedy trial, (Const. art. 6, s. 18,) and as the right of being confronted with the witnesses against him is a personal privilege which the accused may waive, he may require the testimony of witnesses in his favor, residing within the State but beyond the jurisdiction of the court, to be taken under commission. *State* v. *Hornsby*, 554.

62. In prosecutions for larceny, or other criminal proceedings of the same kind, the prisoner cannot require the testimony to be reduced to writing. *State* v. *Duncan*, 562.

63. A question which does not indicate the answer expected from the witness, but merely directs his attention to the subject in relation to which he is to testify, is not a leading one. A leading question is one which suggests to the witness the answer he is to deliver. *Ib.*

64. It is the universal practice in this State, both in criminal and civil proceedings, to permit a witness after having been examined in chief, consigned and cross-examined, to be again examined by the party by whom he was introduced, upon points touching which he had not before testified, or to be subsequently recalled and interrogated in relation to material facts, not before elicited or referred to, either from inadvertence or ignorance of their being within the knowledge of the witness. *Ib.*

65. The declarations of third persons, though not under oath, are admissible in evidence, where they form a part of the *res gestæ*. Thus, on an indictment for horse-stealing, a witness may state, "that on a certain night a negro servant came to witness and told him, that a man had offered him a dollar to get him a horse, and that the negro promised to steal the horse and take him to the man; and that witness told the negro he could do as he had promised;" the statement is admissible to show the circumstances under which the horse was sent, and the agency of the witness in sending him. *Ib.*

See 10, 12, 13, 23, *supra*.

XV. *New Trial.*

66. New trials may be granted in criminal prosecutions.
State v. *Charlot*, 529. *State* v. *George*, 535. *State* v. *Hornsby*, 583.

67. A new trial will not be granted in any criminal case on the ground of newly discovered evidence, where such evidence is irrelevant or unimportant, or the prisoner must have been aware of its existence before the trial, and was guilty of gross negligence in not procuring it.
State v. *Charlot*, 529.

68. Evidence discovered since the trial of one found guilty of larceny, which neither disproves nor has any tendency to disprove the main fact found by the jury, that the accused was guilty of larceny within twelve months previous to the finding of the indictment, cannot entitle the prisoner to a new trial. *State* v. *Clark*, 533.

69. Where a new trial has been improperly refused by the court of the first instance, it will be ordered by the Court of Errors and Appeals.
State v. *George*, 535.

70. Where, on a motion for a new trial, in a criminal prosecution on the ground of the discovery of an important witness since the trial, the name of the witness is not disclosed in the affidavit, the motion must be overruled.
State v. *Lennon*, 543.

71. To entitle the prisoner to a new trial in a criminal prosecution, on the ground of evidence having been discovered since the trial, the newly discovered evidence must be such as would probably produce a different verdict. *State* v. *Hornsby*, 554.

72. The effect of a new trial in a criminal prosecution is merely to grant a rehearing of the case before another jury, with as little prejudice to either party as if it had never been heard before. No advantage is to be taken of the former verdict on the one side, nor of the order awarding a new trial on the other. *State* v. *Hornsby*, 583.

73. A new trial will not be granted, in a prosecution for murder, on the ground of the jury having been permitted to communicate with persons not members of their body, where they were kept together in apartments provided for their use during the adjournment of the court, and the few words exchanged by the jurors with persons not of their body, were with sworn officers of the court, brought unavoidably in contact with them, and did not relate to the trial, nor were of a character to produce the slightest effect upon their decision. *State* v. *Kennedy*, 590.

74. In applications for a new trial in criminal cases, on the ground of newly discovered evidence, it must be shown that there has been reasonable diligence to procure the evidence, that it has been discovered since the trial, and is material, and that it would probably produce a different verdict, if a new trial be granted. *Ib.*

75. In a prosecution for murder where the court is satisfied that the jury cannot agree in a verdict, it may discharge them, though the prisoner oppose it, and may direct a trial before another jury. *State* v. *Ferguson*, 613.

See 53, 58, *Infra.*

XVI. *Arrest of Judgment.*

See 15, *Supra.*

XVII. *Judgment.*

76. A judgment condemning a criminal to three years imprisonment at hard labor, and to pay the costs of the prosecution or to remain imprisoned one day longer, is not illegal in a case in which the three years and one day do not exceed the maximum of punishment allowed by law.

State v. *Nolan*, 513.

XVIII. *Appeal.*

77. By the statute of 6 April, 1843, creating the Court of Errors and Appeals, the court is empowered to grant relief against decisions of the inferior tribunals in criminal cases, upon questions confided to their legal discretion. But to enable the court to give such relief, a case must be stated and embodied in the bill of exceptions taken to the decision below, in order that its correctness or incorrectness may be ascertained, unless the alleged error be apparent on the face of the record. *State* v. *Charlot*, 529.

78. Where the record of appeal from a judgment in a criminal prosecution, furnishes no means of judging of the relevancy or importance of testimony, on account of the absence of which the prisoner prayed for a continuance which was refused below, the judgment of the lower court will not be interfered with. *Ib.*

79. The Court of Errors and Appeals has jurisdiction of questions arising out of criminal prosecutions under the provisions of the statute of 7 June, 1806, known as the Black Code. Stat. 6 April, 1843, s. 5.

State v. *George*, 535.

80. On an appeal by one found guilty of uttering a counterfeit bank-bill, taken from a judgment refusing a new trial, asked for on the ground that there was no legal evidence to show that the prisoner had any knowlege of the character of the bank-bill upon which the indictment was framed, the verdict of the jury will be considered conclusive as to the sufficiency of the proof. *Per Curiam:* This court cannot inquire into the correctness of the verdict on this point. The *scienter* was a matter of fact for the jury to find.

State v. *Sheldon*, 540.

81. Where the record of appeal in a criminal case contains neither bill of exceptions, nor assignment of errors apparent on the face of the record, the case cannot be examined. Stat. 6 April, 1843, § 2.

State v. *Major*, 553. *State* v. *Adams*, 571.

82. In an appeal from a judgment in a criminal prosecution, the appellant must spread upon the record so much of the testimony as may be necessary to enable the court to which the appeal is taken to determine, with certainty, whether any error has been committed by the court of original jurisdiction. This may be done by embodying a synopsis of the testimony in a bill of exceptions. *State* v. *Adams*, 571.

83. The statute of 6 April, 1843, creating the Court of Errors and Appeals, authorizes an appeal on behalf of the State, from a judgment quashing an indictment for an assault with a dangerous weapon, and with intent to kill. Sec. 2. *State* v. *Jones*, 573.

84. The statute of 6 April, 1843, establishing the Court of Errors and Appeals does not violate any provision of the constitution. It is not inconsistent with either the first or fourth sections of the fourth article of the constitution. The court established by the act of 1843, though a court of the last resort, is not a *Supreme Court* within the meaning of sec. 1, of art. 4 of that instrument. The term *supreme*, as used in that section, was intended to designate the independence of the court of any legislative control. *Ib.*

85. The right of appeal arises in a criminal case only after verdict, judgment and sentence. Any appeal taken previously will be dismissed, on a motion to that effect. *State* v. *Hornsby*, 583.

CURATOR.

See SUCCESSIONS.

DAYS OF PUBLIC REST.

Civil process may be served on the twenty-fifth of December. That day is not mentioned in art. 207 of the Code of Practice, among those on which no such process can be served. *Irish* v. *Wright*, 428.

DEFAULT.

See CONTRACTS, VI. SALE, 14.

DOMICIL.

One who has given notice in writing of his intention to become a resident of the State to the parish judge of the parish in which he proposes to reside, but who has not resided within it one year without interruption, not having acquired a residence in the manner authorized by the stats. of 7 March, 1816, s. 2, and 16 March, 1818, s. 1, must be considered as "*not domiciliated in the State*" within the meaning of art. 2512 of the Civil Code; and, in case of his absence from the State within a year from the date of a sale made by him, the prescription of one year against redhibitory actions will be suspended as to him during his absence. *Rist* v. *Hagan*, 106.

See CRIMINAL LAW, 57, 58.

DOTAL PROPERTY.

See HUSBAND AND WIFE, 5, 6.

ECCLESIASTICAL LAW.

1. The Spanish ecclesiastical laws have no longer any force in this State.
Wardens of Church of St. Louis v. *Blanc*, 51.
2. The right to nominate a curate, or the *jus patronatus*, of the Spanish law, is abrogated in this State. *Ib.*

EVIDENCE.

I. *When to be introduced.*
II. *Presumption.*
III. *Competency of Witness.*
IV. *Judicial Records and Proceedings.*
V. *Certificate of a Recorder of Mortgages.*
VI. *Bill of Lading.*
VII. *Parol Evidence to Contradict or Enlarge Written Instruments.*
VIII. *Admissibility of Evidence under the Pleadings.*
IX. *Proof of Agreement to pay Interest.*
X. *Proof of Sale of Immovables.*
XI. *Proof of Transfer of Claims or Judgments.*
XII. *Evidence of Parties.*
XIII. *Evidence in Particular Actions.*
1. *In Actions on Bills of Exchange and Promissory Notes.*
2. *In Actions on Policies of Insurance.*
3. *In Proceedings for a Contempt.*
4. *In Proceedings under Stat. of* 10 *March*, 1834, *for Homologation of Sales.*

(*In Criminal Prosecutions*, See CRIMINAL LAW, 10, 12, 13, 23, XIV.)

I. *When to be Introduced.*

1. In an action on a contract alleged to have been executed by an agent of the defendants, the latter cannot object to the contract's being read in evidence on the ground that the authority of the agent had not been proved; but if no authority be afterwards shown, or none can be properly inferred from the evidence, the contract will be of no avail.
Miller v. *Canal and Banking Company*, 236.

II. *Presumption.*

2. The purchaser of a slave, who institutes a redhibitory action on the ground that the slave is a runaway, is not bound to prove that the vice existed before the sale, when discovered within two months thereafter; but this presumption ceases where it is proved that unusual punishments have been inflicted on the slave. Stat. 2 January, 1834, s. 3. *Rist* v. *Hagan*, 106.

III. *Competency of Witness.*

3. The mere incompetency of a person to testify as a witness in a cause, will not authorize a court to exclude from its consideration the legal inferences which might otherwise be drawn from acts done by him, at a time when it is impossible to suppose that any of the parties were manufacturing evidence for the cause. *St. Martin* v. *Creditors*, 1.

4. An agent by whom a contract has been executed, and who has been released by the plaintiff from any liability to him, may be examined as a witness in an action on the contract, to prove the extent of his powers. *Miller* v. *Canal and Banking Company*, 236.

IV. *Judicial Records and Proceedings.*

5. A judgment rendered in an action against the master and owners of a steamer, for damages on the ground of injury sustained by plaintiff through the fault of those in command of the steamer, is conclusive as to such fault in a subsequent action between the master and one of the owners, to recover from another his proportion of the damages, all of which had been paid by the former. *Howrin* v. *Clark*, 27.

6. A judgment of nonsuit in a prosecution in the name of the city, instituted before a magistrate for the recovery of the fine imposed for a disturbance of the public peace, is not conclusive evidence, in an action for false imprisonment, against the parties at whose instance the plaintiff was arrested. *Gerber* v. *Viosca*, 150.

7. The statement in the return of a sheriff on a *fi. fa.* under which property has been sold, that notice of the seizure was sent by mail to the sheriff of the parish in which the owner of the property resided to be served, is not alone sufficient evidence of the service of notice. *Lamorandier* v. *Meyer*, 152.

V. *Certificate of a Recorder of Mortgages.*

8. The certificate of a recorder of mortgages as to the existence or erasure of mortgages, is only *prima facie* evidence of the facts stated in it. *Macarty* v. *Landreaux*, 130.

VI. *Bill of Lading.*

9. A bill of lading is only *prima facie* evidence of the truth of its contents, as between the parties. *Kirkman* v. *Bowman*, 246.

VII. *Parol Evidence to Contradict or Enlarge Written Instruments.*

10. When the law incapacitates persons from making certain contracts, the form of the contract cannot prevent their being allowed to prove the real nature of the transaction by parol evidence, or other proof going to contradict the contents of the acts, and tending to show that the parties intended to evade the provisions of the law; as where a wife binds herself as princi-

pal, though the object was to bind her as surety, for the repayment of money received and used by her husband for his exclusive benefit.

La Gourgue v. *Summers*, 181.

11. A mandate given in writing, in express terms, cannot be enlarged by parol evidence. *Miller* v. *Canal and Banking Company*, 236.

VIII. *Admissibility of Evidence under the Pleadings.*

12. In an action against a sheriff for damages, for the illegal seizure and removal of plaintiff's furniture, under an execution against a third person, evidence is admissible, under a general allegation that the furniture was removed against plaintiff's earnest remonstrances, to show, in aggravation of damages, the manner in which the furniture was removed, and all the concomitant circumstances. *Pascal* v. *Ducros*, 112.

IX. *Proof of Agreement to pay Interest.*

13. Under the Code of 1808, conventional interest could not be recovered, unless the amount had been fixed in writing. Testimonial proof was inadmissible, to prove an agreement to pay such interest. Book 3, tit. 10, art. 32.

Succession of Durnford, 488.

14. Where an authentic act acknowledging a balance to be due, is silent as to the payment of interest, receipts signed by the creditor, acknowledging the payment of instalments of conventional interest "as per agreement," found among the papers of the debtor after his death, are not written evidence of an agreement to pay conventional interest on such balance, nor a recognition in writing of any existing agreement to pay it. *Ib.*

X. *Proof of Sale of Immovables.*

15. The authority of an auctioneer to sell immovables or slaves, and the conditions of the sale must be in writing. C. C. 2584. Parol evidence is inadmissible to prove the assent of the owner to conditions of sale proclaimed, at the time, by the auctioneer. C. C. 2415.

Macarty v. *Canal and Banking Company*, 102.

16. An auction sale of immovables or slaves, not authorized or ratified by the owner in writing, is invalid, unless admitted by the party against whom it is sought to be enforced. C. C. 2155, 2256. *Ib.*

17. The written authority of the vendor is the best evidence of the terms and conditions of the sale of an immovable or slave at auction. The *procès verbal* of the auctioneer is the next best. *Ib.*

18. In the absence of any allegation of fraud or error, parol evidence is inadmissible to prove conditions or stipulations beyond those contained in an authentic act of sale. C. C. 2256. *Ib.*

XI. *Proof of Transfer of Claims or Judgments.*

19. A claim on which suit has been instituted, or a judgment, may be transferred verbally. Such transfers may be proved by witnesses; and where

the amount of the claim, or judgment, exceeds five hundred dollars, the transfer may be established by one witness and corroborating circumstances.

Succession of Delassize, 259.

20. The notice to be given to the debtor to render the transfer of a claim or judgment binding upon third persons, is not required to be in any particular form. It is enough that it be such as to inform him of the fact that his former creditor is divested of all his rights to the thing assigned. Such notice may be proved like any other fact, according to the established rules of evidence; and one witness is sufficient, whatever be the value of the claim or judgment transferred. *Ib.*

XII. *Evidence of Parties.*

21. The books of a merchant cannot be given in evidence in his favor; but if introduced by the other party, the whole must be taken together. C. C. 2244. *Martinstein* v. *Creditors*, 6.

22. Where a party is bound to furnish an account, his adversary may use that part of it which is against him, without being compelled to admit the items in it which are in his favor. *Marr* v. *Hyde*, 13.

See 25, *infra*. CONTEMPT OF COURT, 2.

XIII. *Evidence in Particular Actions.*

1. *In Actions on Bills of Exchange and Promissory Notes.*

23. The holder of a note cannot recover on it, without proving the signatures of previous endorsers by whom he alleges that the note was transferred to him. He might have recovered against the makers, on proof of the endorsement of the payee, without proving the signatures of the subsequent endorsers, had he not set forth such endorsements, and claimed under them.

Hill v. *Buddington*, 119.

24. Where a lost bill was accepted verbally, with a knowledge of the fact of its loss, and the acceptors have treated with the plaintiffs as the holders, proof by a witness of the acknowledgment of the payee that he had transferred the bill to the plaintiffs, is sufficient evidence of their title. In such a case slight evidence of title should suffice. *Per Curiam:* The acknowledgment of the payee is not hearsay, but rather the admission of a party to the bill. It would, perhaps, not be good evidence, because secondary, if the bill itself could have been produced.

Northern Bank of Kentucky v. *Leverich*, 207.

2. *In Actions on Policies of Insurance.*

25. Decision in *Marchesseau* v. *Merchants Insurance Company*, (1 Rob. 438,) as to the evidence necessary to prove a loss under an open policy of insurance, affirmed.

Wightman v. *Western Marine and Fire Insurance Company*, 442.

26. To defeat a recovery on a policy of insurance on the ground that the plaintiff set fire to the premises, it is not necessary that the evidence should be such as would convict the plaintiff on a prosecution for arson. *Ib.*

3. *In Proceedings for a Contempt.*

27. A court may propound interrogatories to an attorney against whom an attachment has been issued for a contempt, for the purpose of ascertaining whether he was the author of the petition containing the contemptuous language for which the attachment was issued, and his intention and motive in writing it; and the court may require an answer to them. Nor is this right a violation of the provision of the 18th sect. of the 6th article of the constitution, which declares, that "in criminal prosecutions no one shall be compelled to give evidence against himself." *State* v. *Soule*, 500.

4. *In Proceedings under stat. of* 10 *March*, 1834, *for Homologation of Sales.*

28. Where the debtor, or other person interested, opposes the homologation of a sale, under execution under the stat. of 10 March, 1834, the burden of proving a compliance with the formalities required by law, is on the party who applies for its homologation. The return of the sheriff on the execution does not throw on the opponent the burden of showing that the formalities of the law have not been complied with. *Lamorandier* v. *Meyer*, 152.

EXCEPTION.

See PLEADING, 6, 8, 11.

EXECUTION OF JUDGMENT.

I. *Seizure under Fi. Fa.*
II. *Opposition of Third Persons, and Injunction.*
III. *Sale of Things Seized and Distribution of Proceeds.*

I. *Seizure under Fi. Fa.*

1. The right given to a debtor to have a seizure reduced to an amount sufficient to satisfy the judgment and costs, is reserved to him alone. If he do not complain that too much has been seized, no other party can make the objection. *Brown* v *Cougot*, 14.

2. A legacy, being indivisible as between the debtor and creditor, without the consent of both, a portion of it only cannot be seized and sold under execution. *Per Curiam:* The executors of the estate cannot, without their consent, be compelled to pay the legacy to a number of transferrees, whether by voluntary assignment, or by legal transfers resulting from sales under execution. *Ib.*

3. Notice to the debtor of the seizure of his property under a *fi. fa.* is indispensable, whether the debtor resides within the parish in which the property is situated, or not. C. P. 654, 655, 667. *Lamorandier* v *Meyer*, 152.

4. The statement in the return of a sheriff on a *fi. fa.* under which property has been sold, that notice of the seizure was sent by mail to the sheriff of the parish in which the owner of the property resided to be served, is not alone sufficient evidence of the service of notice. *Ib.*

5. A creditor who has obtained judgment against a corporation and issued ex-

ecution thereon, may propound interrogatories to any stockholder, under the 13th section of the stat. of 20 March, 1839, to ascertain whether the whole amount of his stock-subscription has been paid in; and if any portion be unpaid, it may be seized by the creditor in satisfaction, as far as it will go, of his judgment. The fact of other stockholders having paid less than their proportion, is a matter to be settled between the stockholders themselves.

Brode v. *Firemen's Insurance Company*, 244.

6. Where no sale could be made of a slave seized under execution, for want of any bid of sufficient amount to satisfy a special mortgage entitled to priority over the plaintiff's judgment, and the *fi. fa.* is returned into court, the slave cannot be detained by the sheriff. C. P. 684. Nor will the fact of a judgment having been obtained from a court of original jurisdiction, annulling the mortgage as simulated and fraudulent, authorize the detention of the slave, where the defendant has taken a suspensive appeal. If the plaintiff was apprehensive that the slave, if returned to the debtor, might be concealed or taken out of the State, he might have caused him to be sequestered, notwithstanding the suspensive appeal. *Fink* v *Martin*, 256.

II. *Opposition of Third Persons, and Injunction.*

7. A promise by a legatee to pay to a third person, on the settlement of a succession, a certain per centage on the amount of a legacy, does not authorize the latter to oppose the seizure and sale of the legacy under a *fi. fa.* taken out by a creditor of the former, on the ground that the seizure is more than sufficient to satisfy the claim, and that the sale of the legacy may cause irreparable injury to the opponent. The right of third persons to oppose an execution, is confined to those cases in which the opponent is the owner of the thing seized, or has a privilege on it. C. P. 395, 396.

Brown v. *Cougot*, 14.

8. One who suffers a judgment to be rendered against him, without pleading in compensation a debt which he might have opposed to his adversary's demand, does not thereby lose his right of action against the plaintiff for the amount of the debt; but he must institute a separate action therefor, before the court having jurisdiction over the plaintiff's domicil. He cannot enjoin the execution of plaintiff's judgment on the ground of its being extinguished by compensation. C. P. 373. *De Lizardi* v. *Hardaway*, 22.

9. An execution cannot be enjoined, on grounds which might have been pleaded in defence before judgment. *Ib.*

10. Where notes held by different persons are secured by the same mortgage, no one of them can arrest a sale of the mortgaged property provoked by a holder of another note. He has no other right to interfere, than to cause the proceeds of the sale to be brought into court for distribution.

City Bank v *McIntyre*, 467.

11. Where a debtor against whom an execution has been issued, makes no opposition to the manner in which the property is sold, when he might have interfered to prevent it, he cannot enjoin the plaintiff in execution, who purchases the property, from enjoying it pending an action to annul the sale. *Ib.*

III. *Sale of Things Seized and Distribution of Proceeds.*

12. A sale of the property of a succession, legally and regularly made under a judgment of a Court of Probates, discharges the mortgages existing on it created by the deceased. The purchaser takes the property free of the encumbrances; and the Probate Court may order their erasure. But a District Court cannot in such a case, issue a *mandamus* to the recorder of mortgages directing him to erase the mortgages, where the mortgagees are not made parties to the proceeding. Such a proceeding would be unavailing, unless carried on contradictorily with the parties interested, and against whom it is intended to be used. *Leverich* v. *Prieur*, 97.

13. Where the debtor, or other person interested, opposes the homologation of a sale, under execution under the stat. of 10 March, 1834, the burden of proving a compliance with the formalities required by law, is on the party who applies for its homologation. The return of the sheriff on the execution does not throw on the opponent the burden of showing that the formalities of law have not been complied with. *Lamorandier* v. *Meyer*, 152.

14. Where the proceeds of property sold under a special mortgage are more than enough to satisfy the mortgage under which the sale was made, and there are subsequent general mortgages existing against it, the surplus of the price should be applied by the sheriff to the satisfaction, *pro tanto*, of the subsequent general mortgages according to their dates, unless ascertained to have been previously satisfied, before giving the release which the purchaser has a right to demand. In such a case, the sheriff has a right to require the payment of the whole price; nor would the levying of an execution upon such surplus by any other creditor of the mortgagor, secure any privilege to the seizing creditor. *La Gourgue* v. *Summers*, 175.

15. The receipt of a twelve-months' bond by a seizing creditor does not operate a satisfaction of the judgment. If the bond be unpaid, the creditor has his recourse against the debtor. *Ib.*

16. A judicial mortgagee, in whose favor a twelve-months' bond has been taken for the price of property sold under an execution against his debtor, must show that the bond or property seized proved insufficient to satisfy his claim, to entitle himself to a preference over subsequent judicial mortgagees, in the distribution of the proceeds of other property subject to the general mortgages existing against the debtor. C. P. 715. *Ib.*

17. A *fi. fa.* having been issued on a judgment ordering mortgaged property, consisting of a plantation and slaves, to be sold to satisfy the claim of the mortgagee, the property was adjudicated to a third person, for a certain sum in cash sufficient to satisfy the execution. The *fi. fa.* was returned, and the return showed, that the purchaser had not complied with the conditions of the sale; but he was put in possession of the property, with the assent of the mortgagee, immediately after the adjudication, and was in possession when an execution in favor of a creditor of his own was levied on the property. The purchaser having paid but part of the price due, the plaintiff in the first execution sued out a second *fi. fa.* for the balance, which was also

levied on the property. *Held*, that the adjudication, of itself, transferred to the purchaser all the rights of the party in whose hands the property was seized, (C. P. 690. ;) that the sale was complete, and that the purchaser became thereby the owner, though indebted to the plaintiff in execution for the price, (C. C. 2586 ;) that the debt due by the mortgagor must be considered as satisfied by the first sale ; and that the proceeds of a crop gathered on the plantation, after the seizure at the suit of the creditor of the purchaser, must be applied, *pro tanto*, to the satisfaction of his execution. C. P. 722. C. C. 457. *Commissioners of Bank of Orleans* v. *Hodge*, 450.

EXECUTOR.

See SUCCESSIONS.

EXECUTORY PROCESS.

See MORTGAGE, IV.

FELONY.

See CRIMINAL LAW, 5, 34.

FIERI FACIAS.

See EXECUTION OF JUDGMENT.

FORGERY.

See CRIMINAL LAW, 20, 21, 80.

FRAUD.

See CONTRACTS, 13.

GRAND JURY.

See CRIMINAL LAW, 15, 29, 37, 38.

HUSBAND AND WIFE.

1. Where the law incapacitates persons from making certain contracts, the form of the contract cannot prevent their being allowed to prove the real nature of the transaction by parol evidence, or other proof going to contradict the contents of the acts, and tending to show that the parties intended to evade the provisions of the law; as where a wife binds herself as prin-

cipal, though the object was to bind her as surety, for the repayment of money received and used by her husband for his exclusive benefit.
Waggaman v. *Zacharie*, 181.

2. The wife has a legal mortgage on the property of her husband, or of the community, to secure the reimbursement of her paraphernal funds, received by her husband. *Ib.*

3. Under the Code of 1808, the wife had a tacit mortgage on her husband's property, to indemnify her for any debts for which she might have bound herself jointly with him, from the day of the execution of the obligation. Book 3, tit. 5, art. 53, § 3; tit. 19, art. 17, § 3. The Code of 1825, art. 2412, having prohibited a wife from binding herself for her husband, or jointly with him, for debts contracted by him before or during the marriage, and having declared, (art. 3280,) that no legal mortgage shall exist except in the cases determined by it, the articles of the Code of 1808, relative to the tacit mortgage of the wife for her indemnification for debts contracted jointly with the husband, have ceased to be in force. Stats. 12 March, 1828; 25 March, 1828, s. 25. The fact of the marriage having been contracted before the promulgation of the Code of 1825, cannot entitle the wife to a mortgage to indemnify her for any liability for her husband, contracted since its promulgation. *Ib.*

4. Buildings or other improvements erected by the community on the separate property of one of the spouses, belong to the latter on the dissolution of the community, who will owe to the other spouse one-half of the increased value which such improvements have added to the property. The difference between the value of the property at the time of the dissolution of the community, in the situation in which it was at the date of the marriage, and its real value, with all the improvements, at the time of such dissolution, is the measure of such increased value. C. C. 2377. *Ib.*

5. After a wife has obtained a separation of property, or a separation from bed and board carrying with it a separation of property, she may alienate any property formerly dotal, and, consequently may ratify any alienation made before the separation. Code of 1808, book 3, tit. 5, arts. 36, 41, 42, 97; tit 20, art. 59. C. C. 2337, 2342, 2343, 2355, 2410, 2411, 2421, 2490.
Guérin v. *Rivarde*, 457.

6. Where dotal property has been alienated by a wife who afterwards obtains a separation of property, prescription will run in favor of the purchaser from the date of the separation. *Ib.*

INDICTMENT.

See CRIMINAL LAW, X.

INJUNCTION.

1. The stat. of 25 March, 1831, s. 3, extended by stat. of 29 March, 1833, s.

3, to third persons obtaining injunctions to arrest the execution of a judgment between other parties, not stating from what date, nor to what time, the interest allowed on the dissolution of an injunction is to run, such interest will be allowed from the date of the injunction to that of its dissolution, as from that time the judgment creditor can proceed with his execution. *Brown* v. *Cougot*, 14.

2. Sec. 3 of the stat. of 25 March, 1831, must be understood as allowing to the defendant in injunction, in case of its dissolution, the highest rate of conventional interest on the amount of his judgment from the date of the injunction to the time of its dissolution, and as leaving it to the discretion of the court to fix the measure of the damages he may be entitled to receive, subject to the restriction that they shall not exceed twenty per cent, unless it be proved that damage was sustained to a larger amount. The court is not bound to allow in all cases damages to the extent of twenty per cent; the amount allowed must depend upon the circumstances of the case. It is only where the principal sum for which the judgment enjoined was rendered bears no interest, that interest can be allowed at ten per cent on dissolving the injunction; where interest was allowed by the judgment enjoined at five per cent on a part of the principal sum, but no interest on the residue, the court should, on dissolving the injunction, allow interest at ten per cent on the latter, and at five per cent on the portion bearing interest at five per cent. Interest is to be allowed only on the principal sum for which judgment was rendered—not on the aggregate of principal, interest and costs. *De Lizardi* v. *Hardaway*, 20.

3. One who suffers a judgment to be rendered against him, without pleading in compensation a debt which he might have opposed to his adversary's demand, does not thereby lose his right of action against the plaintiff for the amount of the debt; but he must institute a separate action therefor, before the court having jurisdiction over the plaintiff's domicil. He cannot enjoin the execution of plaintiff's judgment on the ground of its being extinguished by compensation. C. P. 373. *De Lizardi* v. *Hardaway*, 22.

4. An execution cannot be enjoined, on grounds which might have been pleaded in defence before judgment. *Ib.*

INSOLVENCY.

1. Decision in *West* v. *His Creditors*, 5 Rob. 261, affirmed. *West* v. *Creditors*, 123.

2. A claim belonging to a debtor at the time of his making a surrender of his property under a State insolvent law, belongs to the creditors to whom his property was surrendered, though not placed on his *bilan*, nor given up by him at the time; nor can the insolvent, by subsequently placing the claim on the schedule presented by him on an application for the benefit of the bankrupt law of 19 August, 1841, transfer the claim to an assignee appointed by the bankrupt court. The debtor had no longer any title to the claim,

which had been transferred by the cession to the creditors existing at the time of the surrender. *Ib.*

3. The bankrupt law of 1841 did not suspend the operation of the State insolvent laws, in cases in which proceedings had been commenced before its passage. *Ib.*

4. The syndic of the creditors of an insolvent having caused a rule to show cause why a certificate of debt in the hands of the clerk of the court should not be delivered to him to be administered for the benefit of the creditors, to be served on a creditor who had caused the certificate to be seized under execution, the latter objected that the proceeding by rule was illegal. *Held*, that the rule was well taken, the creditor claiming only a privilege or lien on the certificate. Had the latter set up any title to the certificate, and been in possession of it, the proper remedy to recover it would have been by a regular action. *Ib.*

5. Where property attached is released on the execution of bond with surety, and the debtor makes a surrender of his property before judgment, after which the action is cumulated with the insolvent proceedings, and a judgment for the claim is entered up with the consent of the syndic, the surety will be discharged. *Per Curiam:* Had no bond been given, the property attached would not have been subject to satisfy the judgment rendered against the syndic, but would have formed a part of the general fund from which all creditors were to be paid. The bond represents the property attached, so far as the attaching creditor is concerned. If, under the judgment against the syndic, the attaching creditor could have had no privilege on the property seized, he can have no right upon the bond, as the property represented by it has gone to the benefit of the mass of the creditors.

Keyes v. *Shannon*, 172.

6. Where a debtor, who has made a surrender of his property, but has not been discharged from his debts, afterwards acquires other property, the only mode to subject such property to the payment of those debts, is by opening the proceedings on the cession, and obtaining an order from the court in which they were pending to force a new cession. This may be done by any one of the old creditors; but they have no claim against him, unless he has property more than enough to discharge all debts incurred by him since his surrender, and to support himself and family; and any portion which may be liable for the old debts, must be abandoned for the benefit of all the former creditors. No one of them can sue and obtain judgment against him, and seize and sell such new property in satisfaction of his claim. Stat. 20 February, 1817, s. 28. C. C. 2173.

Quimper v. *Bierra*, 204.

7. Art. 2173 of the Civil Code, which authorizes any one of the creditors of an insolvent who has made a surrender of his property but has not been discharged from his debts, to force a new cession, on showing that the debtor has acquired property more than sufficient for his maintenance, is not repealed by the 5th sect. of the stat. of 28 March, 1840, authorizing any two judgment

creditors whose claims exceed a certain amount to coerce a forced surrender, that section having no application to the case provided by art. 2173. *Ib.*

8. No action can be maintained by the syndic of an insolvent estate to recover from a third person the amount of notes given for the price of property belonging to the estate, on the allegations that the notes were illegally obtained by defendant from a former syndic, with full knowledge that the latter had no authority to dispose of them and that he did so in fraud of the creditors of the insolvent, and that the amount of the notes was received by the defendant, where it is neither alleged nor proved that the former syndic has failed to account for the proceeds of the notes nor that any account has ever been demanded of him. *Nicholson* v. *Jacobs*, 233.

INSURANCE.

1. Notice of a loss of property, insured against fire, should be given with as little delay as the circumstances of the case will permit, to enable the insurers to take measures to protect their interests, and preserve any property saved from damage or loss; but the preliminary proof, required for the purpose of adjusting the loss, need not be presented so promptly. The clause requiring preliminary proof is always construed liberally. Where notice of the loss was given immediately, a delay of nineteen days from the date of the fire, is not unreasonable.

Wightman v. *Western Marine and Fire Insurance Company*, 442.

2. Notice of the loss of property, insured against fire, and the preliminary proof required, are in the nature of an amicable demand; and to put a party upon strict proof, the want of them should be specially pleaded. *Ib.*

3. The fact of one of the conditions of a policy of insurance requiring that any claim for a loss shall be sustained, "if required, by the books of accounts and other vouchers" of the assured, creates no implied warranty on the part of the latter to keep books of account, and to be ready to exhibit them when called upon. *Ib.*

4. Decision in *Marchesseau* v. *Merchants Insurance Company*, (1 Rob. 438,) as to the evidence necessary to prove a loss under an open policy of insurance, affirmed. *Ib.*

5. To defeat a recovery on a policy of insurance on the ground that the plaintiff set fire to the premises, it is not necessary that the evidence should be such as would convict the plaintiff on a prosecution for arson. *Ib.*

INTEREST.

1. To ascertain the amount due on a debt bearing interest on which partial payments have been made, interest should be calculated from the maturity of the debt till the day of a partial payment. If the payment exceed the interest then due, it should be applied first to the payment of the interest, and the residue to the extinguishment of the principal; interest to be calculated on the balance due up to the next partial payment, and so on. Should any

partial payment be less than the amount of interest at the time, it must be imputed, so far as it will go, to the extinguishment of interest. C. C. 2160. *Martinstein* v. *Creditors*, 6.

2. Where there is no stipulation for the payment of interest, it is due from the time of putting the debtor in default for the payment of the principal. C. C. 1932. *Marr* v. *Hyde*, 13.

3. An agent is responsible for interest on any sum of money employed for his own use, from the time of so employing it. C. C. 2984. *Ib.*

4. The stat. of 25 March, 1831, s. 3, extended by stat. of 29 March, 1833, s. 3, to third persons obtaining injunctions to arrest the execution of a judgment between other parties, not stating from what date, nor to what time, the interest allowed on the dissolution of an injunction is to run, such interest will be allowed from the date of the injunction to that of its dissolution, as from that time the judgment creditor can proceed with his execution. *Brown* v. *Cougot*, 14.

5. Sec. 3 of the stat. of 25 March, 1831, must be understood as allowing to the defendant in injunction, in case of its dissolution, the highest rate of conventional interest on the amount of his judgment from the date of the injunction to the time of its dissolution, and as leaving it to the discretion of the court to fix the measure of the damages he may be entitled to receive, subject to the restriction that they shall not exceed twenty per cent, unless it be proved that damage was sustained to a larger amount. The court is not bound to allow in all cases damages to the extent of twenty per cent; the amount allowed must depend upon the circumstances of the case. It is only where the principal sum for which the judgment enjoined was rendered bears no interest, that interest can be allowed at ten per cent on dissolving the injunction; where interest was allowed by the judgment enjoined at five per cent on a part of the principal sum, but no interest on the residue, the court should, on dissolving the injunction, allow interest at ten per cent on the latter, and at five per cent on the portion bearing interest at five per cent. Interest is to be allowed only on the principal sum for which judgment was rendered—not on the aggregate of principal, interest and costs. *De Lizardi* v. *Hardaway*, 20.

6. On the rescission of the sale of a slave for defects in the title, interest on the price cannot be allowed from judicial demand, where the slave remained in the possession of the purchaser. His services must be regarded as equivalent to the interest of the purchase money. Interest should be allowed only from the date of the return, or tender, of the slave to the vendors, in pursuance of the judgment rescinding the sale. *Moreau* v. *Chauvin*, 157.

7. Where a bill of exchange has not been protested, interest is due only from judicial demand. *Northern Bank of Kentucky* v. *Leverich*, 207.

8. Under the Code of 1808, conventional interest could not be recovered, unless the amount had been fixed in writing. Testimonial proof was inadmissible to prove an agreement to pay such interest. Book 3, tit. 10, art. 32. *Succession of Durnford*, 488.

9. Where an authentic act acknowledging a balance to be due, is silent as to

the payment of interest, receipts signed by the creditor, acknowledging the payment of instalments of conventional interest "as per agreement," found among the papers of the debtor after his death, are not written evidence of an agreement to pay conventional interest on such balance, nor a recognition in writing of any existing agreement to pay it. *Ib.*

INTERPRETATION.

See CRIMINAL LAW, II.

INTERROGATORIES.

See CONTEMPT OF COURT, 2.

INTERVENTION.

See PLEADING, III.

JOINT OBLIGATIONS.

See CONTRACTS, V.

JUDGMENT.

1. A judgment rendered in an action against the master and owners of a steamer, for damages on the ground of injury sustained by plaintiff through the fault of those in command of the steamer, is conclusive as to such fault in a subsequent action between the master and one of the owners, to recover from another his proportion of the damages, all of which had been paid by the former. *Howrin* v. *Clark*, 27.
2. The stat. of 22 March, 1843, sec. 2, dispensing with notices of judgment in certain cases, does not apply to the case of a judgment against a garnishee by whom interrogatories had been answered, rendered on a rule to show cause, where the rule was not served on the garnishee in consequence of his absence from the State; and where, in such a case, notice of judgment was subsequently served on the garnishee, the time within which an appeal will lie must be calculated from the date of the notice.
Brode v. *Firemen's Insurance Company*, 38.
3. The proper time for the judge to order public notice to be given to the creditors to oppose, if they think fit, an administrator's account, is when he applies for an order to pay the debts of the estate. C. C. 1168, 1169, 1172. It is only when the administrator has funds in his hands, and has made a tableau of distribution, that the creditors can be lawfully called upon to establish their claims contradictorily with each other. But where, at the instance of the administrator, on his prayer for an order to sell the property of the estate, and on the exhibition of a list of its liabilities, the creditors

have been notified to present their claims and to show cause why the account should not be homologated, a judgment rendered thereon in favor of a creditor, will be binding on the estate, though it will not preclude any opposition which other creditors may make to the claim when a regular tableau of distribution shall be filed. *Succession of Hart*, 121.

4. A judgment of nonsuit in a prosecution in the name of the city, instituted before a magistrate for the recovery of the fine imposed for a disturbance of the public peace. is not conclusive evidence, in an action for false imprisonment, against the parties at whose instance the plaintiff was arrested. *Gerber* v. *Viosca*, 150.

5. Defendant having pleaded his discharge as a bankrupt under the act of 1841, plaintiff impeached it, and defendant excepted to the impeachment for vagueness and insufficiency. On the trial of the exception the court sustained it, and thereupon gave judgment at once in favor of defendant upon the merits. *Held*, that the case not being before the court on its merits, but only on the exception, no judgment could be legally rendered but upon the latter leaving the case to be afterwards tried on the merits, when regularly set down; (C. P. 463, 533, 535. Stat. 10 February, 1841, s. 16;) that the main issue was, whether the certificate was a bar to the action; that plaintiff was entitled to a hearing thereon; and that the case should be remanded for that purpose. *Hazard* v. *Boykin—Rehearing*, 254.

See CRIMINAL LAW, 15, 76.

JURY.

1. In an action by a bank against the surety in a bond given by one of its officers for the faithful discharge of his duties, it is the exclusive province of the jury to ascertain whether the principal had been guilty of official neglect, and to what extent; but plaintiffs have a right to require the court to charge the jury, as to the nature and extent of the legal obligations of the defendant under his bond. *Union Bank* v. *Thompson*, 227.

2. A judge has no right to state to the jury his own conclusions drawn from the law and evidence in the case. Such expressions of opinion are calculated to have an undue weight with the jury. *Miller* v. *Canal and Banking Company*, 236.

3. Statements made by a juror of the reasons for his concurrence with the other jurors which are inconsistent with his oath as a juror, furnish no ground for a new trial. *Irish* v. *Wright*, 428.

See CRIMINAL LAW, XIII. GRAND JURY.

LARCENY.

See CRIMINAL LAW, VII. 19, 62, 68.

LETTING AND HIRING.

1. To enable a lessee to recover from the lessor the cost of repairs to the premises leased made by the former, he must show that the latter refused or neglected to make them, though requested to do so; that they were indispensable, and such as the lessor was bound to make; and that the price paid for them was reasonable. C. C. 2663, 2664. *Shall* v. *Banks*, 168.

2. A lease made by the riparian proprietor of a *batture* lying between the public road and the river in front of his land, cannot be annulled by a lessee who has not been disturbed in the enjoyment of the property, on the ground that the premises leased are a portion of the bank of the river, the use of which is free and not susceptible of being leased. The space between the public road and the *levée* is private property, to the exclusive use of which the owner is entitled; and he may use the part which extends from the *levée* to the river, subject to the regulations of the municipal authority, provided he does not prevent the use of it by others; and he may confer upon a lessee the same right. C. C. 446. *Dennistoun* v. *Walton*, 211.

3. The Civil Code, art. 2652, recognizes the validity of the lease of another's property, by declaring that he who leases the property of another warrants the enjoyment of it against the claim of the owner. The principal obligation of the lessor is, to maintain his lessee in the quiet enjoyment of the thing, and, while he is undisturbed, he cannot gainsay the title of his lessor; the object of the contract being the use of the thing. *Ib.*

MANDAMUS.

1. No appeal will lie to the Supreme Court from an order of a District Court, directing a mandamus to a parish judge commanding him to allow an appeal to the District Court from a judgment rendered by him on an opposition made under the stat. of 26 March, 1842, relative to lands divided into town lots. Such an order is not a final judgment in any case pending before the District Court. C. P. 566, 839. *Aliter*, had the mandamus been refused. *City of Lafayette* v. *Parish Judge of Jefferson*, 5.

2. Decision in *Conrad* v. *Prieur*, 5 Robinson, 49, affirmed. *Benjamin* v. *Prieur*, 193.

See MORTGAGE, 4.

MARSHAL.

A marshal is responsible to the party injured, for any damage sustained by the latter in consequence of an illegal sequestration of his property. The marshal must look for indemnity to the party under whose directions he acted. *Lartigue* v. *Claiborne*, 115.

MORTGAGE.

I. *Legal Mortgages.*
II. *Registry and Erasure.*
III. *Transfer of Mortgages.*
IV. *Sale of Mortgaged Property.*
V. *Mortgages as affected by Bankrupt Law of United States of* 19 *Aug.* 1841.

I. *Legal Mortgages.*

1. A judicial mortgagee, in whose favor a twelve-months' bond has been taken for the price of property sold under an execution against his debtor, must show that the bond or property seized proved insufficient to satisfy his claim, to entitle himself to a preference over subsequent judicial mortgagees, in the distribution of the proceeds of other property subject to the general mortgages existing against the debtor. C. P. 715.

La Gourgue v. *Summers*, 175.

2. The wife has a legal mortgage on the property of her husband, or of the community to secure the reimbursement of her paraphernal funds, received by her husband. *Waggaman* v. *Zacharie*, 181.

3. Under the Code of 1808, the wife had a tacit mortgage on her husband's property, to indemnify her for any debts for which she might have bound herself jointly with him, from the day of the execution of the obligation. Book 3, tit. 5, art. 53, § 3; tit. 19, art. 17, § 3. The Code of 1825, art. 2412, having prohibited a wife from binding herself for her husband, or jointly with him, for debts contracted by him before or during the marriage, and having declared, (art. 3280,) that no legal mortgage shall exist except in the cases determined by it, the articles of the Code of 1808, relative to the tacit mortgage of the wife for her indemnification for debts contracted jointly with the husband, have ceased to be in force. Stats. 12 March, 1828; 25 March, 1828, s. 25. The fact of the marriage having been contracted before the promulgation of the Code of 1825, cannot entitle the wife to a mortgage to indemnify her for any liability for her husband, contracted since its promulgation. *Ib.*

II. *Registry and Erasure.*

4. A sale of the property of a succession, legally and regularly made under a judgment of a Court of Probates, discharges the mortgages existing on it created by the deceased. The purchaser takes the property free of the encumbrances; and the Probate Court may order their erasure. But a District Court cannot in such a case, issue a *mandamus* to the recorder of mortgages directing him to erase the mortgages, where the mortgagees are not made parties to the proceeding. Such a proceeding would be unavailing, unless carried on contradictorily with the parties interested, and against whom it is intended to be used. *Leverich* v. *Prieur*, 97.

5. A recorder of mortgages is not bound, *ex officio*, to erase from his records mortgages extinguished by a probate sale, or by the want of a new inscription, on being informed of the circumstances under which they are extinguished. He may do so, but it will be at his peril. The question whether the mortgages have been extinguished, can only be decided contradictorily with the mortgagees. *Ib.*

6. A mortgage duly recorded, can be erased from the books of the recorder only by the consent of the mortgagee, or by a judgment decreeing such erasure. C. C. 3335, 3336. It is the property of the mortgagee, and cannot be destroyed by any act of the recorder.

Macarty v. *Landreaux*. 130.

7. A mortgagee cannot maintain an action against a recorder of mortgages for damages for the mere act of erroneously erasing a mortgage, where no attempt has been made to enforce the mortgage. As the act of the recorder could not destroy the mortgage, even against an innocent purchaser, who had bought on the faith of a certificate of there being no mortgage on the property, he can be made liable to the mortgagee for such damages only as may result from the fact of the mortgagee's recourse against the mortgaged property being rendered thereby more difficult and expensive. But the recorder will be responsible to the purchaser, for any loss to which he may have been subjected by the error. *Ib.*

8. The certificate of a recorder of mortgages as to the existence or erasure of mortgages, is only *prima facie* evidence of the facts stated in it. *Ib.*

9. The certificate of a recorder of mortgages declaring that no mortgages exist on certain property, is *prima facie* evidence that none exist. The burden of proving the contrary, is on the party who contests the correctness of the certificate. *Sewell* v. *Hennen*, 216.

III. *Transfer of Mortgages.*

10. Though the negotiability of a note secured by mortgage is not restricted, so far as the personal responsibility of the parties to it is concerned, by its being *paraphed, ne varietur*, by a notary, for the purpose of identifying it, and though want of consideration cannot be opposed to a transferree, for a valuable consideration, before maturity, who received it in the usual course of business, the mortgage given to secure the note does not partake of its negotiability. It is merely assignable, and is subject to all the equities existing between the original parties. *Per Curiam:* A mortgage cannot be transferred to a third person, so as to give him any greater right than the mortgagee himself possessed. *Schmidt* v. *Frey*, 435.

IV. *Sale of Mortgaged Property.*

11. The clause, *de non alienando*, in a sale in which the vendor reserves a mortgage, does not prevent a sale of the property by the mortgagor. The latter may transfer the property, subject to the right which that clause gives the mortgagee of proceeding summarily against it, as if still belonging to the mortgagor. *Ducros* v. *Fortin*, 165.

12. Where the proceeds of property sold under a special mortgage are more than enough to satisfy the mortgage under which the sale was made, and there are subsequent general mortgages existing against it, the surplus of the price should be applied by the sheriff to the satisfaction, *pro tanto*, of the subsequent general mortgages according to their dates, unless ascertained to have been previously satisfied, before giving the release which the purchaser has a right to demand. In such a case, the sheriff has a right to require the payment of the whole price; nor would the levying of an execution upon such surplus by any other creditor of the mortgagor, secure any privilege to the seizing creditor. *La Gourgue* v. *Summers*, 175.

13. Where notes held by different persons are secured by the same mortgage, no one of them can arrest a sale of the mortgaged property provoked by a holder of another note. He has no other right to interfere, than to cause the proceeds of the sale to be brought into court for distribution.

City Bank v. *McIntyre*, 467.

14. A party in whose favor judgment had been rendered in a court of original jurisdiction on an application for an order of seizure and sale, caused the mortgaged property to be sold pending a devolutive appeal, and purchased it himself, crediting the execution by the price. The judgment having been reversed on appeal and the case remanded for a new trial, on a rule taken by defendants on the plaintiff, to show cause why the sale should not be rescinded: *Held*, that the court properly ordered the rule to be made absolute and the sale rescinded, unless the price of the adjudication was paid into court within a fixed period; and that the right to rescind the sale could not be affected by any judicial mortgage in favor of a creditor of the purchaser, the eviction of the latter by a superior title relieving the property from all mortgages acquired under him. *Beaulieu* v. *Furst*, 485.

V. *Mortgages as affected by Bankrupt Law of United States of* 19 *August*, 1841.

15. The District Court of the United States, sitting in bankruptcy under the act of Congress of 19 August, 1841, was authorized to cite persons holding mortgages, under the State laws, on property surrendered by a bankrupt, and to order the erasure of their mortgages, when necessary for the settlement of the bankrupt estate. *Ducros* v. *Fortin*, 165.

16. Where one holding a mortgage on property surrendered by a bankrupt under the act of 19 August, 1841, though cited before the District Court of the United States in which the proceedings in bankruptcy were pending, to show cause why the property mortgaged should not be sold free of encumbrance, reserving his rights upon the proceeds, suffers the rule taken on him to be made absolute without opposition, he must be considered as having waived any right he may have had to oppose it, and he will be bound thereby. He cannot afterwards be permitted to set up his mortgage against a *bona fide* purchaser, who has bought on the faith of his apparent acquiescence.

Ib.

17. Decision in *Conrad* v *Prieur*, 5 Robinson, 49, affirmed.
Benjamin v *Prieur*, 193.

MANSLAUGHTER.

See CRIMINAL LAW, 6, 7, 8.

MURDER.

See CRIMINAL LAW, 6, 9, 23, 24, 26, 27, 28, 35, 40, 46, 48, 73, 75.

NEW ORLEANS.

1. The stat. of 8 March, 1836, dividing the city of New Orleans into three municipalities, did not abolish the old city corporation, nor deprive it of the right of suing for the amount of forfeited bonds and recognizances, directed by sec. 4 of the stat. of 1 April, 1835, to be recovered for its use. There is nothing in the statute dividing the city into municipalities, nor in any other statute, giving to any municipality the right to recover the amount of a forfeited bond or recognizance executed before its Recorder.
Second Municipality v. *Labatut*, 33.

2. Owners of real estate in the second Municipality of New Orleans cannot be compelled to pay any portion of the cost of paving done in front of their property, unless such paving was directed to be done by a special ordinance of the Municipal Council, after notice given to those interested, that they might have an opportunity of opposing its passage. Stats. 8 March, 1836, s. 11; 20 March, 1840, s. 7. Ord. of 2d Municipality of New Orleans of 2 May, 1836. Where paving has been done on the mere order of the chairman of the committee on streets and landings, a subsequent ordinance providing for the payment for the work, though it may be considered a ratification by the council of the acts of the chairman, cannot bind those who had no opportunity of opposing the execution of the work by showing that it was unnecessary. *Second Municipality* v. *Botts*, 198.

NEW TRIAL.

Statements made by a juror of the reasons for his concurrence with the other jurors, which are inconsistent with his oath as a juror, furnish no ground for a new trial. *Irish* v. *Wright*, 428.

See CRIMINAL LAW, 53, 58, XV.

NOLLE PROSEQUI.

See CRIMINAL LAW, XII.

NOTICE.

See JUDGMENT, 2.

OFFENCES AND QUASI-OFFENCES.

1. The owners of a steamer are liable for any injury to others, resulting from the fault of those charged with the navigation of the steamer.

Enders v. *Steamer Henry Clay*, 30.

2. Where, in consequence of the neglect of the agents of a railway company to chain or put blocks under the wheels of cars left standing on a track, constructed on a pier used as a public highway, one, who was crossing the track at a point over which it was necessary for him to pass in order to reach his vessel, moored to the pier, is, during a dark night, and without any fault on his part, run over and seriously injured by the cars, which had been put in motion by a strong wind, he will be entitled to recover damages to the extent of the injury sustained. C. C. 2294, 2295.

Brown v. *Pontchartrain Railroad Company*, 45.

3. A bishop cannot be made liable in damages for any expression of opinion as to the extent of his episcopal authority, nor for any act or omission in the exercise of his spiritual functions. Arts. 2294, 2295 of the Civil Code do not apply to such cases. Such acts or omissions violate no legal right, nor do they involve any dereliction of legal duty or obligations. Courts of justice enforce civil obligations only—not spiritual ones.

Wardens of Church of St. Louis v. *Blanc*, 51.

4. Malice is of the essence of slander. Unless it be alleged, no action can be maintained for a libel. *Ib.*

5. A corporation cannot maintain an action for slander. *Ib.*

6. One who causes a drunken person to be arrested by the police for disturbing the peace in the neighborhood of his residence, is not liable in damages for so doing. *Stertzback* v. *Quirk*, 111.

7. Though sheriffs and other public officers, acting in good faith, within the sphere of their duties, and in obedience to legal process, are entitled to protection, yet when they act in a manner contrary to their own convictions of right, and upon bonds of indemnity, persons injured by their proceedings are entitled to a liberal measure of damages. *Pascal* v. *Ducros*, 112.

8. In an action against a sheriff for damages, for the illegal seizure and removal of plaintiff's furniture, under an execution against a third person, evidence is admissible, under a general allegation that the furniture was removed against plaintiff's earnest remonstrances, to show, in aggravation of damages, the manner in which the furniture was removed, and all the concomitant circumstances. *Ib.*

9. In assessing damages for an illegal seizure of furniture, made by a sheriff under an execution against a third person, the jury should take into consideration the manner in which the seizure was made, and the degree of rigor or lenity with which the officer acted. *Ib.*

10. The deputy by whom an illegal seizure was made, need not be joined, as a co-trespasser, with the sheriff, in an action against the latter for damages. *Ib.*

11. After an answer to the merits, an exception on the ground of the non-joinder of a co-trespasser, is too late. *Ib.*

12. A marshal is responsible to the party injured, for any damage sustained by the latter in consequence of an illegal sequestration of his property. The marshal must look for indemnity to the party under whose directions he acted. *Lartigue* v. *Claiborne*, 115.

13. One who designedly represents another as solvent, when he knew that he was not so, and thereby induces a third person to give him a credit, in consequence of which the latter sustains a loss, will be bound to indemnify the party injured by such misrepresentations. *Parrish* v. *Cirode*, 117.

14. A mortgagee cannot maintain an action against a recorder of mortgages for damages for the mere act of erroneously erasing a mortgage, where no attempt has been made to enforce the mortgage. As the act of the recorder could not destroy the mortgage, even against an innocent purchaser, who had bought on the faith of a certificate of there being no mortgage on the property, he can be made liable to the mortgagee for such damages only as may result from the fact of the mortgagee's recourse against the mortgaged property being rendered thereby more difficult and expensive. But the recorder will be responsible to the purchaser, for any loss to which he may have been subjected by the error. *Macarty* v. *Landreaux*, 131.

15. Where one employed by the lessee of a market to collect his dues, but not to superintend its police, causes a person to be arrested for making a disturbance in the market, the act not being within the scope of his authority as agent, cannot subject the principal to damages for any injury resulting therefrom. *Gerber* v. *Viosca*, 150.

16. A judgment of nonsuit in a prosecution in the name of the city, instituted before a magistrate for the recovery of the fine imposed for a disturbance of the public peace, is not conclusive evidence, in an action for false imprisonment, against the parties at whose instance the plaintiff was arrested. *Ib.*

17. Where the master of a steamer, for the fraudulent purpose of aiding a debtor in removing his property into a foreign country beyond the reach of a creditor, conceals from the latter the fact of his having entered into an arrangement with the debtor for its removal, and, with a full knowledge of the rights of the creditor, transports the property out of the United States, thereby preventing the creditor from levying an attachment and saving his debt, he will be liable to the creditor for the amount of the debt, where it does not exceed the value of the property so removed.

Irish v. *Wright*, 428.

See JURY, 1.

OPPOSITION OF THIRD PERSONS.

A promise by a legatee to pay a third person, on the settlement of a succession, a certain per centage on the amount of a legacy, does not authorize the latter to oppose the seizure and sale of the legacy under a *fi. fa.* taken

out by a creditor of the former, on the ground that the seizure is more than sufficient to satisfy the claim, and that the sale of the legacy may cause irreparable injury to the opponent. The right of third persons to oppose an execution, is confined to those cases in which the opponent is the owner of the thing seized, or has a privilege on it. C. P. 395, 396.

Brown v. *Cougot*, 14.

PARAPHERNAL PROPERTY.

See HUSBAND AND WIFE, 2.

PARTIES.

See EVIDENCE, XII. PLEADING, I.

PAYMENT.

1. To ascertain the amount due on a debt bearing interest on which partial payments have been made, interest should be calculated from the maturity of the debt till the day of a partial payment. If the payment exceed the interest then due, it should be applied first to the payment of the interest, and the residue to the extinguishment of the principal; interest to be calculated on the balance due up to the next partial payment, and so on. Should any partial payment be less than the amount of interest at the time, it must be imputed, so far as it will go, to the extinguishment of interest. C. C. 2160.

Martinstein v. *Creditors*, 6.

2. Payment by the drawees of the original of a bill, drawn in duplicate payable to order, made under a forged endorsement, is no defence to an action by the payee, against the drawer, on the protest of the duplicate for non-acceptance. The payment made on the forged endorsement was at the risk of those who made it. *Brown* v. *Mechanics and Traders Bank*, 143.

3. The receipt of a twelve-months' bond by a seizing creditor does not operate a satisfaction of the judgment. If the bond be unpaid, the creditor has his resource against the debtor. *La Gourgue* v. *Summers*, 175.

PERJURY.

See CRIMINAL LAW, 30, 39.

PLEADING.

I. *Parties to Action.*
II. *Exceptions and Answer.*
III. *Intervention.*

(*In Criminal Prosecutions, See* CRIMINAL LAW, XI.)

I. *Parties to Action.*

1. The deputy by whom an illegal seizure was made, need not be joined, as a co-trespasser, with the sheriff, in an action against the latter for damages.

Pascal v. *Ducros*, 112.

2. After an answer to the merits, an exception on the ground of the non-joinder of a co-trespasser, is too late. *Ib.*

3. No law authorizes the substitution of the name of the transferree of a claim in suit for that of the transferror, on the records of the court. In case of such a transfer, it is customary to prosecute the suit to judgment in the name of the plaintiff, but for the benefit of the transferree.

Succession of Delassize, 259.

4. Heirs represented by an attorney of absent heirs appointed by a court, are not heirs "*represented in the State*," within the meaning of art. 122 of the Code of Practice, which declares, that "all actions may be brought against vacant successions, when all the heirs are absent and not represented in the State, provided they be instituted against the curator." The representation which it contemplates is that of an agent, or curator duly appointed; and when the absent heirs are not so represented, a judgment rendered against the curator of the vacant succession, is as valid against the succession as if rendered against the heirs. C. P. 123. C. C. 1205.

Succession of Durnford, 488.

II. *Exceptions and Answer.*

5. A judgment rendered against the master and other owners of a steamer for damages, for injuries sustained in consequence of the fault of the master, having been paid by the latter and one of the owners, they sued the other owner to recover his proportion of the damages. Defendant denied his liability to pay anything to the master, who had the exclusive control of the boat at the time of the injury; and prayed that, for any amount which he might be condemned to pay to the other plaintiff, he might have judgment in warranty against the master: *Held*, that defendant is not bound to reimburse to the master any portion of the damages occasioned by his own fault (C. C. 2972); and that, though defendant, if he pay any portion of the loss, may have recourse against the master, the latter cannot be cited in warranty, his liability not being a case of personal warranty within the meaning of art. 379 of the Code of Practice. *Per Curiam:* Until defendant pays a portion of the loss he has nothing to claim of his agent, and can have no judgment against him. *Howrin* v. *Clark*, 27.

6. Where in an action commenced by attachment against a steamer, its captain and owners, the names of the owners are not set forth in the petition, but defendants answer to the merits without pleading any exception, and, on judgment being rendered against them personally, execute an appeal bond disclosing their names, no objection can be made to the irregularity of a judgment, *in personam*, against them, on the ground of the omission to set out the names of the owners. *Enders* v. *Steamer Henry Clay*, 30.

7. Where the defendant in an action to rescind the sale of a slave on account of a redhibitory defect, alleges, in her answer, that the defect complained of was an apparent one, the allegation will preclude her from recovering against her vendor cited in warranty. *Lemos* v. *Daubert—Rehearing*, 225.

8. After property attached has been bonded, and the case is at issue on the merits, it is too late to object to the attachment as irregular, in consequence of the suit being for damages. *Irish* v. *Wright*, 428.

9. Notice of the loss of property insured against fire, and the preliminary proof required, are in the nature of an amicable demand; and to put a party upon strict proof, the want of them should be specially pleaded. *Wightman* v. *Western Marine and Fire Insurance Company*, 442.

10. Pleading in compensation should be favored, as it tends to prevent the unnecessary multiplication of suits. *Succession of Durnford*, 488.

11. Appellant, while acting as curator of a vacant succession, was evicted from land purchased by him from the deceased, and in his account he credited himself with the amount claimed as damages for the eviction. On an opposition by the heirs, on the ground of prescription: *Held*, that until they appeared and claimed the succession the curator was its legal representative, and could not enforce a demand, in his own favor, against it; and that to the extent of the funds in his hands, his claim was compensated, and might be opposed to the claims of the heirs by way of exception, even if incapable of being enforced in a direct action. *Ib.*

III. *Intervention.*

12. An intervenor, who claims property in controversy between other parties, cannot interfere further than to prove his right to the property. He cannot contest the plaintiff's claim against the defendant, nor urge any irregularities in the suit; nor plead exceptions having for their object the dismissing of the action. *West* v. *Creditors*, 123.

13. A garnishee cannot interfere, as to the merits of the case, between the plaintiff and defendant. *Brode* v. *Firemen's Insurance Company*, 244.

PLEDGE.

1. Art. 3124 of the Civil Code determines the rights of a pledgee in relation to the other creditors of the pledgor. The right of the pledgor against the pledgee are regulated by art. 3132. *Florence* v. *Greene*, 10.

2. Under art. 3132 of the Civil Code, the pledgor is entitled to choose whether the thing pledged shall be retained by the pledgee at its appraised value, or be sold at public auction, only when the pledgee does not insist upon its being sold to obtain payment out of the price, but signifies his wish, with the consent of the pledgor, to have it adjudicated to himself at its appraised value. *Ib.*

PRESCRIPTION.

1. The possession by the creditor of property of the debtor, with the consent

of the latter, for the purpose of paying himself out of its hire, is an acknowledgment of the debt, interrupting prescription.

Montgomery v. *Levistones*, 145.

2. Where a debtor acknowledges a debt and asks for indulgence, it is a tacit renunciation of any prescription which may have been acquired. C. C. 3424. *Ib.*

3. Where dotal property has been alienated by a wife, who afterwards obtains a separation of property, prescription will run in favor of the purchaser from the date of the separation. *Ib.*

PRESUMPTION.

See EVIDENCE, II.

PRIVILEGE.

1. Decision in *Conrad* v. *Prieur*, 5 Robinson, 49, affirmed.

Benjamin v. *Prieur*, 193.

2. To entitle the United States under the act of Congress of 3 March, 1797, s. 5, to have any debt due to them first satisfied out of the property of an insolvent, where the latter has made a voluntary assignment for the benefit of his creditors, there must be an actual insolvency though not a declared one, and the assignment must have been a general one; but a party cannot by assigning all his property by different acts, defeat the priority of the United States, under the pretext of the assignments being partial.

United States v. *Bank of United States*, 262.

PUBLIC THINGS.

1. Where the owner of ground, in dividing it into lots for sale, reserves a part for a public alley, and subsequently sells the lots with reference to a plan on which the alley is described, and as fronting on the alley, the ground set apart for the alley must be considered as dedicated to public use; and the purchasers of the lots have a right to insist upon its being kept open for the purposes for which it was thus dedicated. *M'Donogh* v. *Calloway*, 92.

2. A lease made by the riparian proprietor of a *batture* lying between the public road and the river in front of his land, cannot be annulled by a lessee who has not been disturbed in the enjoyment of the property, on the ground that the premises leased are a portion of the bank of the river, the use of which is free and not susceptible of being leased. The space between the public road and the *levée* is private property, to the exclusive use of which the owner is entitled; and he may use the part which extends from the *levée* to the river, subject to the regulations of the municipal authority, provided he does not prevent the use of it by others; and he may confer upon a lessee the same right. C. C. 446. *Dennistoun* v. *Walton*, 211.

QUASI-OFFENCES.

See OFFENCES AND QUASI-OFFENCES.

RAPE.

See CRIMINAL LAW, V.

REDHIBITORY ACTION.

See SALE, 11, 12, 16, 17.

REGISTRY.

See MORTGAGE, II.

RELIGIOUS FREEDOM.

In framing the State Constitution of 1812, it was deemed unnecessary to insert any restriction upon the power of the legislature on the subject of religious sentiments or worship, as it had already been settled, by solemn compact between the original states and the people of the territory, unalterable but by common consent, under the act of congress of 2d March, 1805, and in conformity with the ordinance of that body of 13th July, 1787, that religious freedom, in its broadest sense, should form the basis of all laws, constitutions and governments which forever after might be formed within said territory. *Wardens of Church of St. Louis* v. *Blanc*, 51.

RESCISSION.

See SALE, III.

RULE TO SHOW CAUSE.

The syndic of the creditors of an insolvent having caused a rule to show cause why a certificate of debt in the hands of the clerk of the court should not be delivered to him to be administered for the benefit of the creditors, to be served on a creditor who had caused the certificate to be seized under execution, the latter objected that the proceeding by rule was illegal. *Held*, that the rule was well taken, the creditor claiming only a privilege or lien on the certificate. Had the latter set up any title to the certificate, and been in possession of it, the proper remedy to recover it would have been by a regular action. *West* v. *Creditors*, 123.

SALE.

I. *Requisites and Proof of Sale.*
II. *Obligations and Privilege of Vendor.*
III. *Rescission.*
IV. *Judicial Sales.*

I. *Requisites and Proof of Sale.*

1. The authority of an auctioneer to sell immovables or slaves, and the conditions of the sale must be in writing. C. C. 2584. Parol evidence is inadmissible to prove the assent of the owner to conditions of sale proclaimed, at the time, by the auctioneer. C. C. 2415.

Macarty v. *Canal and Banking Company*, 102.

2. An auction sale of immovables or slaves, not authorized or ratified by the owner in writing, is invalid, unless admitted by the party against whom it is sought to be enforced. C. C. 2255, 2256. *Ib.*
3. The written authority of the vendor is the best evidence of the terms and conditions of the sale of an immovable or slave at auction. The *procès verbal* of the auctioneer is the next best. *Ib.*
4. In the absence of any allegation of fraud or error, parol evidence is inadmissible to prove conditions or stipulations beyond those contained in an authentic act of sale. C. C. 2256. *Ib.*
5. There must be an express stipulation in a contract of sale, to render joint purchasers liable, *in solido*, or as sureties for each other, for the price. Such liability cannot be presumed. *Kohn* v. *Hall*, 149.

II. *Obligations and Privilege of Vendor.*

6. Where the owner of ground, in dividing it into lots for sale, reserves a part for a public alley, and subsequently sells the lots with reference to a plan on which the alley is described, and as fronting on the alley, the ground set apart for the alley must be considered as dedicated to public use; and the purchasers of the lots have a right to insist upon its being kept open for the purposes for which it was thus dedicated.

M'Donogh v. *Calloway*, 92.

7. The clause, *de non alienando*, in a sale in which the vendor reserves a mortgage, does not prevent a sale of the property by the mortgagor. The latter may transfer the property, subject to the right which that clause gives the mortgagee of proceeding summarily against it, as if still belonging to the mortgagor. *Ducros* v. *Fortin*, 165.
8. Where one to whom a slave has been adjudicated at public auction, discovers that the slave is affected with a redhibitory disease, he may decline to complete the purchase. *Lemos* v. *Daubert*, 224.
9. The obligation of a vendor, under his warranty, must be determined by the law in force at the time of the sale. *Succession of Durnford*, 488.
10. Where a judgment has been rendered in the Supreme Court in favor of

the plaintiff, in an action against the purchaser of land instituted by a third person claiming to be its owner, the purchaser must be considered as evicted from the date of the order from the execution of the judgment made in the court below, and the value of the property at that time is the measure of the damages due for the eviction—not its value at any subsequent period when the owner may take actual possession. Code of 1808, book 3, tit. 6, art. 57. *Ib.*

III. *Rescission.*

11. The purchaser of a slave, who institutes a redhibitory action on the ground that the slave is a runaway, is not bound to prove that the vice existed before the sale, when discovered within two months thereafter; but this presumption ceases where it is proved that unusual punishments have been inflicted on the slave. Stat. 2 January, 1834, s. 3. *Rist* v. *Hagan*, 106.

12. One who has given notice in writing of his intention to become a resident of the State to the parish judge of the parish in which he proposes to reside, but who has not resided within it one year without interruption, not having acquired a residence in the manner authorized by the stats. of 7 March, 1816, s. 2, and 16 March, 1818, s. 1, must be considered as "*not domiciliated in the State*" within the meaning of art. 2512 of the Civil Code; and, in case of his absence from the State within a year from the date of a sale made by him, the prescription of one year against redhibitory actions will be suspended as to him during his absence. *Ib.*

13. Where a vendor fails to comply with a stipulation made by him to cause a general mortgage existing on the property sold to be erased, the purchaser may require the rescission of the sale. C. C. 1920, 2041. To determine whether a failure of a party to execute an engagement will authorize the rescission of the contract, it is only necessary to consider whether the stipulation be such that the contract would not have been entered into without it. *Moreau* v. *Chauvin*, 157.

14. Plaintiff purchased a slave from defendants, who stipulated in the act of sale to erase, within a certain time, a general mortgage existing on the property in favor of the minor children of their vendor, which the latter had bound herself to cancel. The mortgage not having been erased, plaintiff sued to rescind the sale. On a plea by defendants that they had not been put *in mora*, in the manner prescribed by arts. 1905, 1906, 1907 of the Civil Code, it was shown that they had been repeatedly requested to comply with their contract, and that, eighteen months after the period at which the mortgage was to have been erased, their vendor, though often requested to do so, had not instituted any proceeding for the purpose of giving a special mortgage, in place of the general one she had agreed to erase: *Held*, that in such a case it was unnecessary to put the defendants in default in the manner required by arts. 1905, *et seq.* of the Civil Code; and that the thing to be performed depending on the will of another, over whom they have no control, the contract is dissolved of right, in consequence of their inability to comply with it. C. C. 2041, 2012. *Ib.*

15. On the rescission of the sale of a slave for defects in the title, interest on the price cannot be allowed from judicial demand, where the slave remained in the possession of the purchaser. His services must be regarded as equivalent to the interest of the purchase money. Interest should be allowed only from the date of the return, or tender of the slave to the vendors, in pursuance of the judgment rescinding the sale. *Ib.*

16. Where the defendant in an action to rescind the sale of a slave on account of a redhibitory defect, alleges, in her answer, that the defect complained of was an apparent one, the allegation will preclude her from recovering against her vendor cited in warranty. *Lemos* v. *Daubert—Rehearing*, 225.

17. A sale cannot be rescinded for a redhibitory defect, proved by the defendant, or admitted by the plaintiff, to have been an apparent one, or one known to the purchaser at the time of the purchase. C. C. 2497, 2498. *Ib.*

18. A party in whose favor judgment had been rendered in a court of original jurisdiction on an application for an order of seizure and sale, caused the mortgaged property to be sold pending a devolutive appeal, and purchased it himself, crediting the execution by the price. The judgment having been reversed on appeal and the case remanded for a new trial, on a rule taken by defendants on the plaintiff, to show cause why the sale should not be rescinded: *Held*, that the court properly ordered the rule to be made absolute and the sale rescinded, unless the price of the adjudication was paid into court within a fixed period; and that the right to rescind the sale could not be affected by any judicial mortgage in favor of a creditor of the purchaser, the eviction of the latter by a superior title relieving the property from all mortgages acquired under him. *Beaulieu* v. *Furst*, 485.

IV. *Judicial Sales.*

19. A sale of the property of a succession, legally and regularly made under a judgment of a Court of Probates, discharges the mortgages existing on it created by the deceased. The purchaser takes the property free of the encumbrances; and the Probate Court may order their erasure. But a District Court cannot in such a case, issue a *mandamus* to the recorder of mortgages directing him to erase the mortgages, where the mortgagees are not made parties to the proceeding. Such a proceeding would be unavailing, unless carried on contradictorily with the parties interested, and against whom it is intended to be used.

Leverich v. *Prieur*, 97.

20. The statement in the return of a sheriff on a *fi. fa.* under which property has been sold, that notice of the seizure was sent by mail to the sheriff of the parish in which the owner of the property resided to be served, is not alone sufficient evidence of the service of notice.

Lamorandier v. *Meyer*, 152.

21. Where the debtor, or other person interested, opposes the homologation of a sale, under execution under the stat. of 10 March, 1834, the burden of proving a compliance with the formalities required by law, is on the party

who applies for its homologation. The return of the sheriff on the execution does not throw on the opponent the burden of showing that the formalities of law have not been complied with. *Ib.*

22. Where one holding a mortgage on property surrendered by a bankrupt under the act of 19 August, 1841, though cited before the District Court of the United States in which the proceedings in bankruptcy were pending, to show cause why the property mortgaged should not be sold free of encumbrance, reserving his rights upon the proceeds, suffers the rule taken on him to be made absolute without opposition, he must be considered as having waived any right he may have had to oppose it, and he will be bound thereby. He cannot afterwards be permitted to set up his mortgage against a *bona fide* purchaser, who has bought on the faith of his apparent acquiescence. *Ducros* v. *Fortin*, 165.

23. A *fi. fa.* having been issued on a judgment ordering mortgaged property, consisting of a plantation and slaves, to be sold to satisfy the claim of the mortgagee, the property was adjudicated to a third person, for a certain sum in cash sufficient to satisfy the execution. The *fi. fa.* was returned, and the return showed, that the purchaser had not complied with the conditions of the sale ; but he was put in possession of the property, with the assent of the mortgagee, immediately after the adjudication, and was in possession when an execution in favor of a creditor of his own was levied on the property. The purchaser having paid but part of the price due, the plaintiff in the first execution sued out a second *fi. fa.* for the balance, which was also levied on the property. *Held*, that the adjudication, of itself, transferred to the purchaser all the rights of the party in whose hands the property was seized, (C. P. 690 ;) that the sale was complete, and that the purchaser became thereby the owner, though indebted to the plaintiff in execution for the price, (C. C. 2586 ;) that the debt due by the mortgagor must be considered as satisfied by the first sale ; and that the proceeds of a crop gathered on the plantation, after the seizure at the suit of the creditor of the purchaser, must be applied, *pro tanto*, to the satisfaction of his execution. C. P. 722. C. C. 457. *Commissioners of Bank of Orleans* v. *Hodge*, 450.

24. Where a debtor against whom an execution has been issued, makes no opposition to the manner in which the property is sold, when he might have interfered to prevent it, he cannot enjoin the plaintiff in execution, who purchases the property, from enjoying it pending an action to annul the sale. *City Bank* v. *McIntyre*, 467.

SEQUESTRATION.

Where no sale could be made of a slave seized under execution, for want of any bid of sufficient amount to satisfy a special mortgage entitled to priority over the plaintiff's judgment, and the *fi. fa.* is returned into court, the slave cannot be detained by the sheriff. C. P. 684. Nor will the fact of a judgment having been obtained from a court of original jurisdiction, annulling the mortgage as simulated and fraudulent, authorize the detention of the

slave, where the defendant has taken a suspensive appeal. If the plaintiff was apprehensive that the slave, if returned to the debtor, might be concealed or taken out of the state, he might have caused him to be sequestered, notwithstanding the suspensive appeal. *Fink* v. *Martin*, 256.

SHERIFF.

1. Though sheriffs and other public officers, acting in good faith, within the sphere of their duties, and in obedience to legal process, are entitled to protection, yet when they act in a manner contrary to their own convictions of right, and upon bonds of indemnity, persons injured by their proceedings are entitled to a liberal measure of damages. *Pascal* v. *Ducros*, 112.

2. In an action against a sheriff for damages, for the illegal seizure and removal of plaintiff's furniture, under an execution against a third person, evidence is admissible, under a general allegation that the furniture was removed against plaintiff's earnest remonstrances, to show, in aggravation of damages, the manner in which the furniture was removed, and all the concomitant circumstances. *Ib.*

3. In assessing damages for an illegal seizure of furniture, made by a sheriff under an execution against a third person, the jury should take into consideration the manner in which the seizure was made, and the degree of rigor or lenity with which the officer acted. *Ib.*

4. The deputy by whom an illegal seizure was made, need not be joined, as a co-trespasser, with the sheriff, in an action against the latter for damages. *Ib.*

5. The return of a sheriff showing the manner in which interrogatories propounded to a witness were served on the opposite party, may be amended on the trial of the case. *Per Curiam:* A sheriff should be permitted to amend his return so as to make it conform to the fact, whenever it is called in question. It is not too late on the trial of the case.

Miller v. *Canal and Banking Company*, 236.

See CRIMINAL LAW, 55.

STATUTES, CITED, EXPOUNDED, &c.

I. *Statutes of United States.*
II. *Statutes of the State.*
III. *Statute of Mississippi.*
IV. *Statutes of Pennsylvania.*
V. *Statutes of England.*

I. *Statutes of United States.*

1787. July 13. Territory North West of river Ohio. *Wardens of Church of St. Louis* v. *Blanc*, 51.

1797. March 3, s. 5. Priority of Payment of United States. *United States* v. *Bank of United States*, 262.
1799. ——2. —————— *Ib.*
1805. ——2. Territory of Louisiana. *Wardens of Church of St. Louis* v. *Blanc*, 51.
1841. August 19. Bankruptcy. *West* v. *Creditors*, 123. *Ducros* v. *Fortin*, 165. *Hazard* v. *Boykin*, 253, 254.

II. *Statutes of the State.*

1805. May 4, s. 2. Rape. *State* v. *Bill*, 527.
—————— s. 33. Adopting English Common Law. *State* v. *Nolan*, 513. *State* v. *McCoy*, 545. *State* v. *Hornsby*, 554. *State* v. *Kennedy*, 590. *State* v. *Moore*, 618.
1806. June 7, s. 1. Trial of Slaves. *State* v. *George*, 535.
—————— s. 7. Rape by Slave. *State* v. *Bill*, 527.
—————— s. 16. Homicide of Slave. *State* v. *Moore*, 518.
1814. February 22, s. 2. Malicious striking of Master, &c., by Slave. *State* v. *George*, 535.
1815. —————— 6, s. 5. Oaths of Office. *State* v. *Kennedy*, 590.
1816. March 7. Church of St. Louis of New Orleans. *Wardens of Church of St. Louis* v. *Blanc*, 51.
—————— s. 2. Acquisition of Domicil. *Rist* v. *Hagan*, 106.
1817. February 20. Voluntary Surrender. *West* v. *Creditors*, 123.
—————— s. 28. —————— *Quimper* v. *Bierra*, 204.
—————— s. 35. —————— *Keyes* v. *Shannon*, 179.
1818. March 16, s. 1. Acquisition of Domicil. *Rist* v. *Hagan*, 106.
—————— 19, s. 2. Horse-stealing. *State* v. *Nolan*, 513.
—————— 20, ss. 1, 2. Homicide. *State* v. *Moore*, 618.
1819. —— 3. Translation of Partidas. *Wardens of Church of St. Louis* v. *Blanc*, 51.
1820. February 16. Translation of Partidas. *Ib.*
1821. January 16, s. 3. Criminal Court of the First District. *State* v. *Kennedy*, 590.
1822. March 22. Church of St. Louis of New Orleans. *Wardens of Church of St. Louis* v. *Blanc*, 51.
1823. —— 27, s. 2. Contempts of Court. *State* v. *Soulé*, 500.
1825. February 19, s. 1. Trial of Slaves. *State* v. *George*, 535.
1826. March 29. Voluntary Surrender. *West* v. *Creditors*, 123.
——. April 7, s. 6. Attachments. *Irish* v. *Wright*, 428.
—————— s. 9. Sequestration. *Fink* v. *Martin*, 256.
1827. March 20. Branding of Animals. *State* v. *Charlot*, 529.
1828. —— 12. Repealing certain articles of Code of 1808. *Waggaman* v. *Zacharie*, 181.

1828. March 25, s. 25. Repealing Rules of Practice and Civil Laws in force before promulgation of Code of 1825 and Code of Practice. *Wardens of Church of St. Louis* v. *Blanc*, 51. *Waggaman* v. *Zacharie*, 181.

1829. February 7, s. 5. Assault with Dangerous Weapon, &c. *State* v. *Mix*, 549.

1831. March 25, s. 3. Injunction. *Brown* v. *Cougot*, 14. *De Lizardi* v. *Hardaway*, 20.

——————— s. 1. Juries. *State* v. *Jones*, 616.

1833. ——— 29, s. 3. Injunction. *Brown* v. *Cougot*, 14.

1834. January 2, s. 3. Redhibitory Action. *Rist* v. *Hagan*, 106.

——- March 10. Titles of Purchaser at Judicial Sales. *Lamorandier* v. *Meyer*, 152.

1835. April 1, s. 4. Forfeited Bonds and Recognizances. *Second Municipality* v. *Labatut*, 33.

1836. March 2, s. 1. City Court of New Orleans. *Quimper* v. *Bierra*, 204.

——————— 8. City of New Orleans. *Second Municipality* v. *Labatut*, 33.

——————— s. 11. ———————. *Second Municipality* v. *Botts*, 198.

1839, March 20, s. 6. Sequestration. *Fink* v. *Martin*, 256.

——————— s. 13. Interrogatories to third persons under *fi. fa.* *Brode* v. *Firemen's Insurance Company*, 244.

1840, March 6. Juries. *State* v. *Jones*, 616.

——————— s. 5. *State* v. *Nolan*, 513.

——————— 20, s. 4. City of New Orleans. *Second Municipality* v. *Labatut*, 33.

——————— s. 7. City of New Orleans. *Second Municipality* v. *Botts*, 198.

——————— 28, s. 1. Abolishing *ca. sa.* *Ex parte Powell*, 95.

——————— s. 5. Forced surrender. *Quimper* v. *Bierra*, 204.

1841, February 10, s. 14. Illegal conversion of money by public officers. *Ex parte Powell*, 95.

——————— s. 16. Setting down causes for trial. *Hazard* v. *Boykin*—*Rehearing*, 254.

1842, February 16, s. 4. Church of St. Patrick of New Orleans. *City Bank* v. *McIntyre*, 467.

——, March 26. Lands divided into town lots. *City of Lafayette* v. *Parish Judge of Jefferson*, 5.

1843, March 22, s, 2. Appeals and notices of judgment. *Brode* v. *Firemen's Insurance Company*, 38.

——————— 30. City of New Orleans. *Second Municipality* v. *Labatut*, 33.

——, April 5. Liquidation of banks. *United States* v. *Bank of United States*, 262.

——————— 6. Court of Errors and Appeals in criminal matters. *State* v. *Jones*, 573.

——————— s. 2. ——————————————— *State* v. *Charlot*, 529. *State* v. *Adams*, 571.

1843, April 6, s. 5. Court of Errors and Appeals in criminal matters. *State* v. *George*, 535.
———— s. 7. Crimes committed by slaves. *Ib.*
1844, January 26. Juries in parish of Rapides. *State* v. *Jones*, 573.

III. *Statute of Mississippi.*

1840, February 21, s. 7. Transfer of evidences of debt by banks. *Hyde* v. *Planters Bank of Mississippi*, 416.

IV. *Statutes of Pennsylvania.*

1836, February . Charter of Bank of United States. *United States* v. *Bank of United States*, 262.
——, June 14. Assignees for benefit of creditors and other trustees. *Ib.*
1841, May 4. Assignments by Bank of United States. *Ib.*
———— 5. ————————————————. *Ib.*

V. *Statutes of England.*

2 Henry IV., ch. 9. Jurors. *State* v. *Jones*, 616.
2 and 3 Edward VI., ch. 24. Venue in cases of murder. *State* v. *McCoy*, 545.
13 Elizabeth, ch. 5. Statute of frauds. *United States* v. *Bank of United States*, 262.
18 Elizabeth, ch. 7. Rape. *State* v. *Bill*, 527.
2 George II., ch. 21. Venue in cases of murder. *State* v. *McCoy*, 545.

STEAMER.

The second clerk of a steamer, may execute on behalf of the boat, a bill of lading in the ordinary way, and his receipt for merchandize delivered on board, will be binding; but to make a special contract—as to bind the boat for articles not delivered on board, his authority must be shown.

Kirkman v. *Bowman*, 246.

SUCCESSIONS.

1. A legacy, being indivisible as between the debtor and creditor, without the consent of both, a portion of it only cannot be seized and sold under execution. *Per Curiam:* The executors of the estate cannot, without their consent, be compelled to pay the legacy to a number of transferrees, whether by voluntary assignment, or by legal transfers resulting from sales under execution. *Brown* v. *Cougot*, 14.
2. An executor is not a public officer within the meaning of the 14th sect. of the stat. of 10 February, 1841. The office of executor is a private trust. C. C. 2687, 2788. Since the stat. of 28 March, 1840, abolishing imprisonment for debt, a *ca. sa.* cannot be taken out on the return of a *fi. fa.* unsatisfied, against one who has converted to his own use money received by him as executor. *Ex parte Powell*, 95.

3. A sale of the property of a succession, legally and regularly made under a judgment of a Court of Probates, discharges the mortgages existing on it created by the deceased. The purchaser takes the property free of the encumbrances; and the Probate Court may order their erasure. But a District Court cannot in such a case, issue a *mandamus* to the recorder of mortgages directing him to erase the mortgages, where the mortgagees are not made parties to the proceeding. Such a proceeding would be unavailing, unless carried on contradictorily with the parties interested, and against whom it is intended to be used. *Leverich* v. *Prieur*, 97.

4. The proper time for the judge to order public notice to be given to the creditors to oppose, if they think fit, an administrator's account, is when he applies for an order to pay the debts of the estate. C. C. 1168, 1169, 1172. It is only when the administrator has funds in his hands, and has made a tableau of distribution, that the creditors can be lawfully called upon to establish their claims contradictorily with each other. But where, at the instance of the administrator, on his prayer for an order to sell the property of the estate, and on the exhibition of a list of its liabilities, the creditors have been notified to present their claims and to show cause why the account should not be homologated, a judgment rendered thereon in favor of a creditor, will be binding on the estate, though it will not preclude any opposition which other creditors may make to the claim when a regular tableau of distribution shall be filed. *Succession of Hart*, 121.

5. The capacity or incapacity of particular classes of persons to inherit, depends upon the legislative will. *Hyde* v. *Planters Bank*, 416.

6. Heirs represented by an attorney of absent heirs appointed by a court, are not heirs "*represented in the State*," within the meaning of art. 122 of the Code of Practice, which declares, that "all actions may be brought against vacant successions, when all the heirs are absent and not represented in the State, provided they be instituted against the curator." The representation which it contemplates is that of an agent, or curator duly appointed; and when the absent heirs are not so represented, a judgment rendered against the curator of the vacant succession, is as valid against the succession as if rendered against the heirs. C. P. 123. C. C. 1205.

Succession of Durnford, 488.

7. Where the curator of a succession claims in his account rendered to the Probate Court, an amount as damages for an eviction from land sold to him by the deceased, the allowance of which is opposed by the heirs, that court has jurisdiction of the questions whether there was a warranty and eviction, and as to the amount of the damage. A Probate Court may inquire into the title to real estate, when necessary to enforce its admitted jurisdiction. Nor will the fact of the right to damages being unliquidated, be any obstacle to their being claimed and allowed in compensation of any amount due by the curator to the succession. It is not necessary that the damages should have been previously liquidated in an action by the curator against the heirs. *Ib.*

8. Appellant, while acting as curator of a vacant succession, was evicted from

land purchased by him from the deceased, and in his account he credited himself with the amount claimed as damages for the eviction. On an opposition by the heirs, on the ground of prescription: *Held*, that until they appeared and claimed the succession the curator was its legal representative, and could not enforce a demand in his own favor, against it; and that to the extent of the funds in his hands, his claim was compensated, and might be opposed to the claims of the heirs by way of exception, even if incapable of being enforced in a direct action. *Ib.*

SURETY.

1. Where property attached is released on the execution of bond with surety, and the debtor makes a surrender of his property before judgment, after which the action is cumulated with the insolvent proceedings, and a judgment for the claim is entered up with the consent of the syndic, the surety will be discharged. *Per Curiam:* Had no bond been given, the property attached would not have been subject to satisfy the judgment rendered against the syndic, but would have formed a part of the general fund from which all creditors were to be paid. The bond represents the property attached, so far as the attaching creditor is concerned. If, under the judgment against the syndic, the attaching creditor could have had no privilege on the property seized, he can have no right upon the bond, as the property represented by it has gone to the benefit of the mass of the creditors.

Keyes v. *Shannon*, 172.

2. One who has bound himself as surety for an officer of a bank in a bond, the condition of which recites that, the principal "shall well and truly perform and fulfil all the duties incumbent upon him by virtue of his office, or such other as may be assigned to him, or shall pay to the bank such damages or losses as it may incur by reason of the unfaithful performance of any of the said duties of said office," will be liable for any loss which the bank may sustain in consequence of any negligence of the principal, gross or slight, in the discharge of his official duties. The liability of the surety is not restricted to losses resulting from the unfaithfulness or dishonesty of the principal. C. C. 1924, 1925. *Union Bank* v. *Thompson*, 227.

3. The surety of an officer of a bank, sued by the bank for the amount of certain notes which plaintiffs alleged that they had been compelled to pay to the holders, in consequence of the neglect of the principal to have them protested at maturity as it was his official duty to do, whereby the endorsers were discharged, may show in reduction of damages, that the parties were liable notwithstanding the want of protest, or were insolvent when the notes matured. It was the duty of the bank, before paying the amount of the notes, to ascertain whether it was necessary to have had them protested. If the parties were insolvent at the time no loss can have been sustained from the want of protest, and the holders could not have recovered against the bank, nor can the surety be made liable to the latter for more than the injury really sustained by the holders of the notes. *Ib.*

TRIAL.

Defendant having pleaded his discharge as a bankrupt under the act of 1841, plaintiff impeached it, and defendant excepted to the impeachment for vagueness and insufficiency. On the trial of the exception the court sustained it, and thereupon gave judgment at once in favor of defendant upon the merits. *Held:* that the case not being before the court on its merits, but only on the exception, no judgment could be legally rendered but upon the latter leaving the case to be afterwards tried on the merits, when regularly set down; (C. P. 463, 533, 535. Stat. 10 February, 1841, s. 16;) that the main issue was, whether the certificate was a bar to the action; that plaintiff was entitled to a hearing thereon; and that the case should be remanded for that purpose. *Hazard* v. *Boykin—Rehearing*, 254.

See JURY, 1, 2. NEW TRIAL.

TWENTY-FIFTH OF DECEMBER.

Civil process may be served on the twenty-fifth of December. That day is not mentioned in art. 207 of the Code of Practice, among those on which no such process can be served. *Irish* v. *Wright*, 428.

VERDICT.

See CRIMINAL LAW, XIII. JURY.

WARRANTY.

See PLEADING, 5. SALE, 6, 9, 10, 11, 13, 15, 16, 17.

END OF VOLUME VIII.